

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: Toyota Motor Corp.
Unintended Acceleration Marketing,
Sales Practices, and Products Liability
Litigation

This document relates to:
All Economic Loss Cases.

Case No. 8:10ML 02151 JVS (FMOx)

Order Granting Motion for Final
Approval of Proposed Class Action
Settlement, and Granting Motion for
Attorneys' Fees, Reimbursement of
Expenses, and Compensation to
Named Plaintiffs

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1 Presently before the Court are Motions filed by the Economic Loss Plaintiffs
2 (“Plaintiffs”) seeking final approval of the proposed class action settlement,
3 including an award of attorney fees, costs, and payments to named plaintiffs and
4 class representatives. (Docket Nos. 3555-56.) As set forth herein, the Court grants
5 the Motions, and grants final approval to the proposed settlement.

6

7 Filed concurrently herewith are the Court’s Final Order Approving Class
8 Action Settlement and the Court’s Final Judgment. Attached hereto as
9 Attachments 1 and 2 are, respectively, the Court’s June 17, 2013 Order Regarding
10 Proposed Class Action Settlement¹ (Docket No. 3804) and the Court’s June 17,
11 2013 Order Regarding Motion for Attorneys’ Fees, Reimbursement of Expenses,
12 and Compensation to Named Plaintiffs (Docket No. 3802). The Clerk is directed
13 to file a copy of this Order on the docket of each economic loss member case
14 number appearing on Attachment A to the Final Judgment.

15

16 I. Introduction

17

18 At a fairness hearing held on June 14, 2013, and as discussed in previous
19 Orders, the Court at length considered the proposed settlement of the economic
20 loss class actions of this multi-district litigation (“MDL”) and objections to that

21

22

23

24 ¹ This Order itself has two attachments, designated Attachments A and B.
25 Respectively, Attachments A and B set forth a list of objections to the proposed
settlement and a detailed explanation of the valuation of the proposed settlement.

1 settlement. (See Docket Nos. 3802 & 3804.)² In those Orders, although the Court
2 found the proposed settlement to be fair, adequate, and reasonable (and thus, in
3 effect tentatively approved the proposed settlement), the Court nevertheless held
4 the Motions in abeyance (and thus, in effect withheld final approval). (Approval
5 Order at 48.) The Court held the Motions in abeyance to consider supplemental
6 briefing after additional details regarding allocation of the settlement funds became
7 available.³ (See Docket No. 3808 (providing for supplemental briefing).) The
8 parties filed their supplemental briefing and evidence on July 12, 2013, styled as a
9 Joint Statement in Support of Amendment No. 2 to Settlement Agreement for Final
10 Settlement Approval (“Jt. Stmt.”) and the Third Declaration of settlement
11 administrator Markham Sherwood. (Docket Nos. 3883-84.)

12

13 After consideration of the issues presented in the original Motions
14 referenced above, the parties’ supplemental briefing, the evidence of record on the
15 issue of both preliminary and final approval of the (amended) Settlement
16

17 ² For full context, this Order should be read in conjunction with the Court’s
18 June 17, 2013 Order Regarding Proposed Class Action Settlement (Docket No.
19 3804) (“Approval Order”) and the Court’s June 17, 2013 Order Regarding Motion
20 for Attorneys’ Fees, Reimbursement of Expenses, and Compensation to Named
Plaintiffs (Docket No. 3802) (“Attorney Fee Order”). Both Orders are attached
hereto.

21 ³ One other issue that remained pending after the fairness hearing has been
22 resolved without the need for supplemental briefing. Specifically, on June 17,
23 2013, the parties’ stipulation regarding the applicability of the release of claims in
24 the Settlement Agreement to claims asserted by putative class members in the
25 Brake MDL. (See Approval Order at 42-43; cf. In re Toyota Motor Corp. Hybrid
Brake Marketing, Sales Practices, and Products Liability Litig., 8:10-ML-02172
(Docket No. 503) (approving stipulation).)

1 Agreement, and the statements of counsel and objectors at both hearings on these
2 matters, the Court grants the Motion for Final Approval of Proposed Class Action
3 Settlement.

4

5 Moreover, as set forth fully in the Attorney Fee Order, the pendency of the
6 Motion for Final Approval was the only impediment to granting the Motion for
7 Attorney Fees, Reimbursement of Expenses, and Compensation to the Named
8 Plaintiffs. With the Court's final approval of the Settlement Agreement, as
9 amended, that impediment has been removed, and the Court therefore grants the
10 Motion for Attorney Fees, Reimbursement of Expenses, and Compensation to the
11 Named Plaintiffs.

12

13 II. Allocation Plan

14

15 As noted in the Court's Approval Order, aided by the settlement
16 administrator, just before the fairness hearing on June 14, 2013, Plaintiffs outlined
17 proposed changes to the Settlement Agreement's Allocation Plan. Specifically, the
18 parties anticipated that all claimants would be reimbursed at 100 percent the
19 calculated value of their claims, regardless of jurisdiction, that there would be
20 sufficient funds to reimburse Toyota for the costs of class administration, and that
21 the remaining funds would be distributed to those non-claimant class members
22 who can be identified. Spillover *cy pres* contributions would be eliminated, and
23 where class members fail to cash settlement checks, their share of settlement funds
24 would be escheated pursuant to applicable State law.

The parties have now memorialized their articulated plan in their Second Amendment to the Settlement Agreement.⁴

In keeping with this plan, the parties, together with the settlement administrator, have collected additional data and provided further analysis regarding amounts anticipated to be paid out to each class member. The settlement administrator has provided updated information regarding the amount to be paid out on existing claims, has provided updated estimates on the amount to be paid out on claims filed on or before the claims deadline,⁵ and has calculated the expected residual amount in both the Alleged Diminished Value Fund and the Cash-in-Lieu-of-BOS Fund.⁶ From that estimate, the settlement administrator has prepared a chart setting forth examples of estimated payments to non-claimants from each fund, factoring in variables such as the actual amount of diminished value and the sliding scale of recovery based on jurisdiction as described in the

⁴ The First Amendment is found at Docket No. 3424 at 10-14. Both relate to the same two subsections, and the Second Amendment effectively supersedes the First Amendment. (See Docket No. 3884-1 (Second Amendment).)

⁵ The claims period has not yet closed, but the July 29, 2013 deadline is looming. The Court recognizes that the estimates provided by the settlement administrator are just that: estimates. Nevertheless, the settlement administrator's estimates are based on past experience in handling class action claims such as those at issue here, and the Court finds those estimates to be sufficiently reliable to grant final approval. Although the actual number of claimants versus non-claimants may not be exactly as estimated, no significant deviation from the estimate is expected. In any event, the residual amount in each fund is expected to be substantial enough that the estimated payout to non-claiming class members will not change to a significant degree.

⁶ Certain totals may require adjustment. (See, e.g., Third Sherwood Decl. (Docket No. 3884) ¶ 6.).)

1 Approval Order. (Approval Order at 8.) The settlement administrator also
2 provided, for comparison purposes, the amounts that would have been paid if there
3 had been full participation by class members in the claims-filing process.
4 (Compare Third Sherwood Decl. ¶¶ 9-10 (charts depicting anticipated payments to
5 non-claimant class members under current Allocation Plan), with id. ¶¶ 12-13
6 (charts depicting likely payments to class members under original Allocation
7 Plan).)

8

9 With this additional briefing and evidence, the Court concludes that the
10 parties have now satisfied the requirement of Rule 23(e)(3) of the Federal Rules of
11 Civil Procedure to identify the terms of the settlement. (Cf. Approval Order at 12-
12 13 (finding requirement not met, scheduling additional hearing, and providing for
13 supplemental briefing).)

14

15 More fundamentally, the additional briefing and evidence reinforces the
16 Court's initial tentative conclusion that the proposed settlement is fair, adequate,
17 and reasonable. The claimants are rewarded for their minimal (yet helpful) effort
18 in filing claims. Specifically, these class members facilitated the parties' and the
19 settlement administrator's information-gathering duties by participating in the
20 claims-filing process, and as a result, they are to be paid 100 percent of the
21 calculated value of their claims. No deduction will be made to the value of their
22 claims for attorney fees, settlement administration costs, or litigation expenses.

23

24 Additionally, despite the failure to file claims, the vast majority of non-
25

1 claimant class members⁷ will nevertheless share the residual value of the two
2 funds, the total of which is expected to exceed \$350 million. These payments
3 represent a significant portion of the amount they would have received under the
4 original terms of the proposed settlement. (Compare Third Sherwood Decl. ¶¶ 9-
5 10, with id. ¶¶ 12-13.) Distribution of payments to non-claimants is possible
6 because reliable data on class membership is available to the settlement
7 administrator, and such distribution is made more feasible because the reliability of
8 that data has been improved through the updates to outdated contact information
9 during the class notice process. (See Approval Order at 13-14.) Thus, because the
10 amount of residual funds is high, and because distribution of those funds to non-
11 claimant class members is feasible, such distribution is desirable.

12

13 Moreover, where non-claimant class members are identified, but do not cash
14 settlement checks, the settlement administrator's resort to state escheatment
15 procedures ensures that the settlement amounts will remain available to non-
16 claimant class members for the maximum extent allowed by state escheatment
17 laws.

18

19 Overall, the Allocation Plan pays claimants at a higher rate, which is fair in
20 light of their assistance facilitating the settlement by providing information and
21 making timely claims. Non-claimants, who have provided no such assistance, are
22 nevertheless to be paid a significant share of what they would have recovered

23

24 ⁷ Absent self-identification through the filing of claims, a small minority of
25 non-claimant class members are not identifiable through existing data. (Jt. Stmt. at
3 n.6.)

1 under the original Allocation Plan if they had filed claims. The only cost of
2 litigation to be shared by class members is the relatively minimal cost of settlement
3 administration.⁸ Additionally, by utilizing state-law escheatment processes as the
4 payment of last resort for uncashed settlement checks, the parties effectively permit
5 class members a longer period of time to claim their portion of the proposed
6 settlement.

7

8 Thus, as discussed herein, the parties have fairly and reasonably resolved the
9 Court's remaining concerns regarding the proposed settlement, and the Court
10 grants final approval of the Settlement Agreement, as amended.

11

12 **III. Objections**

13

14 In both the Approval Order and the Attorney Fee Order, the Court discussed
15 objections to the proposed settlement and the attorney fee award at length. When it
16 ordered supplemental briefing, the Court granted an additional opportunity for the
17 filing of objections. (See Docket No. 3808 (objections to be filed no later than July
18 17, 2013).) The Court intended any further objections be limited to matters
19 discussed in the supplemental briefing.⁹ Pursuant to the Court's Order, two

20

21 ⁸ Of the \$500 million available for cash payments to the class, the \$25
22 million settlement administration costs are relatively minimal, totaling only
23 approximately 5 percent of the value of the cash funds.

24 ⁹ For this reason, the Court declined to hear from counsel for Objectors
25 Brenda Howell and Clarence Morrison at the July 19, 2013 hearing. (See Docket
No. 3633. Nevertheless, as indicated by the Court at the hearing, the Court
previously considered—and rejected—the objections raised by Howell and

1 additional objections were filed by counsel in a timely manner. (See Docket Nos.
2 3887-88 (Guerriero and Boles Objections).) Other objections were mailed to
3 Court, and the Court directed the Clerk to file them. (See Docket No. 3903-06 &
4 3908. (Objections of Ferdinand Fueller, Judi Lapoint, Mary Marcellino, Sydna
5 Lucey, and Estate of Bernstein).)

6

7 The Court has previously addressed the substance of most of these
8 objections. First, in one instance, Objectors Gary and Rebecca Guerriero merely
9 purport to reassert their previously filed objection by incorporating it by reference
10 in their latest filing. (See Docket No. 3887 at 2 (citing Docket Nos. 3632 &
11 3683).) The Court previously addressed the substance of these objections in the
12 Approval Order; thus, no further discussion is warranted. Second, the positions
13 articulated by Daniel J. Wood, Mary Marcellino, Judi Lapoint, Ferdinand Fueller,
14 and Sydna Lucey are similar to those raised by other Objectors. The Court
15 addressed these arguments in the Approval Order and the Attorney Fee Order.
16 (See Approval Order at 13-15 (finding class notice met due process and Rule
17 23(e)(1) requirements), 10 & 35 (settlement waiver provision expressly excludes
18 claims for property damage or personal injury), 35-36 (finding the beginning and
19 ending dates for the sale window and early lease termination window to be
20 supported by uncontroverted expert analysis), & 40 (permissible to exclude
21 recovery past maintenance and repairs ostensibly related to SUA); Attorney Fee
22

23 Morrison. (See Attorney Fee Order at 16-17 (rejecting argument that fee award
24 should be limited to a small percentage of the total award in so-called “mega fund”
25 cases).)

1 Order at 16-19 (addressing objections to amount of attorney fees).)

2

3 The most recent objection filed by Objectors Angela C. Boles, Wayne

4 Harris, and Julie Rainwater warrants further discussion. (Docket No. 3888.)

5 Essentially, these Objectors again contend that the proposed settlement does not

6 provide for recovery of floor mat-related expenses by vehicle owners. (Cf. Docket

7 No. 3594.) Previously, the Court discussed at length the reasons why it finds that

8 the terms of the proposed settlement are fair, adequate, and reasonable as a whole.

9 (Approval Order at 17-30.) As noted repeatedly by the Court, the proposed

10 settlement represents rational tradeoffs of risk and recovery on both sides. (Id. at

11 18-27, 30, 34-35 & 38-39.) To the extent that Objectors believed that the proposed

12 settlement left them uncompensated (or unfairly compensated) because of any

13 characteristics peculiar to their own losses, they were afforded the opportunity to

14 opt out. (Id. at 15-16.) Objectors failed to avail themselves of that opportunity.¹⁰

15 (Cf. Second Sherwood Decl. (Docket No. 3734) Ex. A (list of opt-outs).) These

16 Objectors are represented by able counsel; thus, the Court presumes their failure to

17 opt out is a reasoned judgment rather than a chance occurrence or uninformed

18 choice.¹¹

19

20 ¹⁰ To the contrary, based on representations made by Class Counsel at the

21 June 14, 2013 fairness hearing, the Court infers that these Objectors filed timely

22 claims. (See June 14, 2013 Tr. at 41 (representing that as a result of the proposed

23 settlement, Objectors Boles and Rainwater are eligible for installation of BOS, and

24 Objector Harris is eligible for payment from the Alleged Diminished Value Fund).)

25 ¹¹ Also falling into this category is the unique objection raised by the Estate

26 of Bernstein. (Docket No. 3908.) The Estate's objection focuses on economic

27 losses suffered by vehicle owners who have experienced alleged actual incidents of

28 SUA, and the Estate argues that such economic loss claims should be valued more

1 Moreover, to the extent that Objectors contend that no provision has been
2 made for recovery regarding floor mat-related issues or that “Amendment No. 2 is
3 structured in a manner to expressly avoid providing any floor mat-related
4 compensation,” they are simply wrong. (Docket no. 3883 at 1.) First, as outlined
5 by Toyota in its Reply, floor-mat issues were addressed by a separate recall that
6 offered replacement of floor mats (and carpet cleaning, where necessary). (Docket
7 No. 3728 at 20-22.) There is no expiration date on this recall and class members
8 who are eligible for replacement floor mats may still seek this remedy. (Id. at 22.)
9 Additionally, the Objectors’ argument overlooks the fact that the BOS installation
10 is specifically intended by the parties to remedy floor mat entrapment. (Approval
11 Order at 37.)

12
13 These Objectors also contend that any use of state escheatment procedures
14 should be considered another form of spillover *cy pres* contributions. (Docket No.
15 3888 at 4.) The Court disagrees. Escheatment earmarks funds for class members,
16 to be held by the states until class members comply with procedures to release

17
18 highly than claims of class members who have not experienced SUA. (See id. at
19 2.) As indicated in its filings, the Estate clearly understood it could have chosen
20 exclusion from the class, but it did not, and the Court presumes this is a reasoned
21 judgment based on the relative value of the claim at issue. (See id. at 6.)
22 Nevertheless, that the Estate would have preferred a settlement that compensated
23 more fully its peculiar loss does not render the settlement unfair, inadequate, or
24 unreasonable. Neither Rule 23 nor due process concerns require that a settlement
25 be perfect in all respects or even that it be the best possible settlement; rather, what
is required is a class action settlement that is fair, adequate, and reasonable.
Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998). For the reasons set
forth here and in the Court’s previous Orders, the Court has found the proposed
settlement meets that standard.

1 those funds to them. This arrangement does not fall into the definition of *cy pres*
2 contributions. Moreover, two rounds of checks and a reminder notice will be sent
3 to class members before escheatment occurs. This procedure does not, as
4 Objectors contend, “keep[] consideration from Settlement Class Members.” (*Id.*)
5 To the contrary, it facilitates distribution of such consideration to class members.
6

7 Thus, the newly filed objections do not detract from the Court’s finding that
8 the proposed settlement is fair, adequate, and reasonable.
9

10 **IV. Conclusion**

11
12 As set forth herein, and as discussed extensively in the Approval Order and
13 the Attorney Fee Order,¹² the Court finds that the proposed amended Settlement
14 Agreement represents a settlement to the class that is fair, adequate, and
15 reasonable. The Court finds that, as amended, the Allocation Plan sets forth a
16 reasonable plan of distribution to both claimants and non-claimants in a principled
17 manner that is fair to all class members.
18

19 For that reason, the Court grants the Motion for Final Approval of Proposed
20 Class Action Settlement.
21

22 Moreover, because the pendency of the Motion for Final Approval was the
23 only impediment to granting the Motion for Attorney Fees, Reimbursement of
24

25 ¹² As noted previously, the Approval Order and the Attorney Fee Order are
attached hereto as Attachments 1 and 2, respectively.

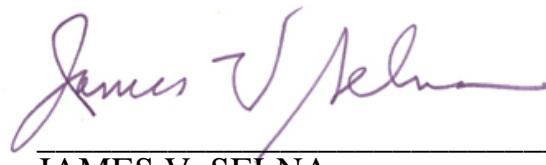
1 Expenses, and Compensation to the Named Plaintiffs, and because that impediment
2 has now been removed, and the Court also grants the Motion for Attorney Fees,
3 Reimbursement of Expenses, and Compensation to the Named Plaintiffs.

4

5 **IT IS SO ORDERED.**

6

7 DATED: July 24, 2013



8

9 JAMES V. SELNA
10 UNITED STATES DISTRICT JUDGE

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3 **ATTACHMENT 1**

4 **Approval Order (MDL Docket No. 3804)**

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: Toyota Motor Corp.
Unintended Acceleration Marketing,
Sales Practices, and Products Liability
Litigation

Case No. 8:10ML 02151 JVS (FMOx)

Order Regarding Proposed Class
Action Settlement

This document relates to:

All Economic Loss Cases.

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1 Presently before the Court is a Motion filed by the Economic Loss Plaintiffs
2 ("Plaintiffs") seeking final approval of the proposed class action settlement.
3 (Docket No. 3555-56.) A number of objections to the proposed settlement and
4 award of fees, costs, and class representative compensation have been filed.¹ The
5 Toyota Defendants and Plaintiffs have filed Reply briefs in support of the
6 settlement. (Docket Nos. 3728 & 3731.)

7
8 As set forth more fully below, generally, the Court believes that the
9 proposed settlement is fair, adequate, and reasonable. Nevertheless, as articulated
10 in detail herein, certain difficulties in the plan of allocation of the settlement funds
11 preclude the Court's final approval of the proposed settlement at this time.
12 Accordingly, and with the following discussion, the Court holds in abeyance the
13 Motion for Final Approval of Class Action Settlement.

14
15 I. Background

16
17 On December 28, 2012, on application from the Economic Loss Plaintiffs,
18 this Court granted preliminary approval to a proposed settlement agreement.² (See
19 Docket Nos. 3344-45 ("Preliminary Approval Orders").) After preliminary
20 approval, the parties amended two terms of the proposed settlement agreement
21 relating to the circumstances under which any excess in each of the two cash funds

22
23 ¹ The objections are discussed herein at length. See *infra* section VII.

24 ² The proposed settlement agreement was reached with the assistance of
25 Court-appointed Settlement Special Master Patrick A. Juneau. (See Docket No.
2462.)

1 might flow into each other. (Docket No. 3424.) Moreover, in their Reply, based
2 on new information regarding the claim filing rates, Plaintiffs outlined changes to
3 the plan of how to allocate the two cash settlement funds. On the morning of the
4 fairness hearing, the parties presented a further refinement on the allocation issue.
5 The terms of the settlement agreement, as amended, are summarized in a separate
6 section, below.

7

8 **II. Class Definition**

9

10 Plaintiffs filed a copy of the Settlement Agreement with their application for
11 preliminary approval of the proposed settlement.³ The Settlement Agreement sets
12 forth a precise definition of the Settlement Class. Specifically, subject to exclusion
13 of certain persons affiliated with or employed by Toyota,⁴ the parties' counsel, and
14 the Court,⁵ the Settlement Class is defined as:

15

16 [A]ll persons, entities or organizations who, at any time as of or
17 before the entry of the Preliminary Approval Order, own or owned,

18

19 ³ The Settlement Agreement is attached as an unenumerated Exhibit to
20 Plaintiffs' Ex Parte Application for preliminary approval of the settlement. (See
21 Docket No. 3342-1 at 1-56.) The Settlement Agreement is also available at the
22 settlement website, www.toyotaelssettlement.com. All otherwise undesignated
23 section symbols in this Order refer to the Settlement Agreement.

24 ⁴ The Settlement Agreement defines "Toyota" as "Toyota Motor
25 Corporation and Toyota Motor Sales, U.S.A., Inc." (§ I(47).) Throughout this
Order, the Court uses the term as it is defined by the parties.

⁵ Also excluded are certain family members of such persons. (§ I(13).)

1 purchase(d), lease(d) and/or insure(d) the residual value, as a Residual
2 Value Insurer, of all Subject Vehicles equipped or installed with an
3 ETCS (as listed in Exhibit 10) distributed for sale or lease in any of the
4 fifty States, the District of Columbia, Puerto Rico and all other United
5 States territories and/or possessions.

6

7 (Settlement Agreement § I(13) (defining “class”).) As noted above, the make,
8 model, and years of the “Subject Vehicles” are set forth in tabular form in Exhibit
9 10 to the Settlement Agreement. (Docket No. 3342-1 at 269-71.) The Subject
10 Vehicles include several year models of the Toyota 4Runner, Avalon, Camry,
11 Celica, Corolla, FJ Cruiser, Highlander, Land Cruiser Prius, RAV4, Sequoia,
12 Sienna, Supra, Tacoma, Tundra, Venza, and Yaris. (Id. at 270.) Also among the
13 Subject Vehicles are several year models of the Lexus ES, GS, GX, HS, IS, LS,
14 LX, RX, and SC. (Id.) Finally, the Subject Vehicles list also includes several year
15 models of the Scion xB, xD, and tC. (Id. at 270-71.) The earliest model year is
16 1998 for certain Toyota and Lexus models; the latest model year is the 2010 model
17 year for a majority of the models of all three makes of vehicle, Toyota, Lexus, and
18 Scion. (Id.)

19

20 III. Terms of Settlement, Allocation Plan and Scope of Release of Claims

21

22 A. Terms of Settlement

23

24 The current terms of the proposed settlement, as reflected by the Settlement
25 Agreement, as modified, may be described as follows.

1 Generally, the proposed Settlement consists of four parts: (1) cash payments
2 totaling \$250 million for diminution of resale value of certain vehicles due to the
3 alleged defects; (2) installation by Toyota dealers of a brake-override system
4 (“BOS”) for certain eligible vehicles,⁶ and cash payments (totaling another \$250
5 million) in lieu of such installation to most of the remaining Subject Vehicles;
6 (3) establishment by Toyota of a Customer Support Program (“CSP”); and
7 (4) establishment by Toyota of an Automobile Safety and Education Fund (“Safety
8 and Education Fund”). Upon this Court’s final approval of the proposed
9 settlement, Toyota will fund a Qualified Settlement Fund (“the Fund”) for
10 payments to class members in the amount of \$500 million.

11 (§§ II(A)(1), (2) & (4).)

12

13 1. Alleged Diminished Value Fund

14

15 This fund consists of a \$250 million allocated to cash payments for
16 diminished value for class members who took certain actions in a sixteen-month
17 period of time, from September 1, 2009, to December 31, 2010.⁷ (§ II(A)(2).)
18 These actions include sale by class members of a Subject Vehicle, return of a
19 leased Subject Vehicle before lease termination, possession of a Subject Vehicle
20 that was declared a total loss, or payment as a residual value insurer on a leased
21 Subject Vehicle due to lease termination before the lease termination date. (Id.)

22

23 ⁶ This subset of the Subject Vehicles is referred to as “BOS-Eligible
24 Vehicles.” (§ I(3) & Ex. 11 (list of BOS-Eligible Vehicles).)

25

⁷ In discussing this provision, the Court refers to this period as “the sale
window.”

1 Also included are payments to certain class members who reported an alleged
2 actual incident of sudden, unintentional acceleration (“SUA”) to Toyota, a Toyota
3 Dealer, or the National Highway Traffic and Safety Administration (“NHTSA”).
4 Any such class member who did so and who returned a leased Subject Vehicle
5 before the lease termination date and before December 1, 2012,⁸ is also eligible for
6 a cash payment from this fund.

2. BOS Installation and Cash-in-Lieu of BOS Installation Fund

10 Second, as part of the Settlement, Toyota will offer to install a BOS in
11 excess of 3.55 million Subject Vehicles.⁹ This portion of the settlement is valued
12 at approximately \$400 million. (Bonne Decl. (Docket No. 3557) ¶ 10 (valuing
13 BOS installation at \$111.50 per vehicle); Motion at 29 (representing number of
14 eligible vehicles to be 3,581,477); Pltfs.’ Reply at 24 & n.61 (multiplying the
15 3,581,477 vehicles eligible for BOS installation by \$111.50 yields a total value of

⁸ Likewise, the Court refers to this period as “the early lease termination window.”

19 ⁹ The Settlement Agreement estimated this number at 2.7 million Subject
20 Vehicles, plus another 550,000 Subject Vehicles as to which Toyota previously
21 offered to install a BOS, but which have not had a BOS installed, for a total of 3.25
22 million. (§ II(A)(3).) Plaintiffs now estimate that the total number of vehicles
23 (including the 550,000) is approximately 3.5 million, with BOS installation being
24 offered to over 3 million Subject Vehicles for the first time as a result of the
25 proposed settlement. (Compare § II(A)(3) with Pltfs.’ Reply at 23.) Other Subject
Vehicles, identified as the hybrid Subject Vehicles, are not offered BOS
installation because those Subject Vehicles already have a system that performs a
similar function. (§ II(A)(3); see also Ptlfs.’ Reply at 14 n.33 (estimating that there
are 1.325 million hybrid Subject Vehicles).)

1 \$399,334,685).)

2
3 Class members who own Subject Vehicles not eligible for BOS installation
4 will receive a cash payment in lieu of such installation, and an additional \$250
5 million contribution to the Fund will be made for this purpose. (§ II(A)(4).)

6
7 3. Customer Support Program

8
9 Third, Toyota will implement a CSP to effectively provide a form of
10 extended warranty coverage for repairs and adjustments to certain components of
11 the Subject Vehicles for a number of years. (§ II(A)(5).) The mileage and term
12 limitations of the CSP are more fully described in the Long Form Notice. (Ex. 4
13 § C(8)(d).) This program provides coverage for repairs and adjustments to correct
14 defects in materials or workmanship related to the acceleration system. “The
15 covered parts are the (i) engine control module; (ii) cruise control switch; (iii)
16 accelerator pedal assembly; (iv) stop lamp switch; and (v) throttle body assembly.”
17 (Id.)

18
19 This program is valued in excess of \$475 million. (Kleckner Decl. (Docket
20 No. 3558) ¶ 11.)¹⁰

21
22
23 ¹⁰ Plaintiffs’ expert witness, Kirk D. Kleckner, has set forth the bases
underlying his valuation of the CSP. The Court finds that the Kleckner opinion is
24 both reliable and relevant. See Fed. R. Civ. 702; Kumho Tire Co. v. Carmichael,
526 U.S. 137, 147 (1999); Daubert v. Merrell Dow Pharm., 509 U.S. 579, 597
25 (1993).

1 4. Safety and Education Fund

2

3 Finally, Toyota will contribute \$30 million to fund automobile safety

4 research and education related to issues in the litigation. (§ II(A)(6).) “The fund

5 will be divided between university-based automobile/transportation research

6 institutes and education/information programs for automobile drivers.” (*Id.*) A

7 number of universities have submitted research proposals to be funded from this

8 portion of the settlement. (See Berman Decl. (Docket No. 3565) ¶ 138 & Exs. F-L

9 (Docket No. 3565-5 to 3565-10).) Generally, these proposals combine aspects of

10 driver behavior and automotive technology to enhance vehicle safety. (See Motion

11 at 23-24 (describing five proposals).)

12

13 B. Allocation Plan

14

15 The parties continue to adjust the Allocation Plan as additional data becomes

16 available from the settlement administrator. Further details are expected to be

17 made available to Court in the next month. The summary set forth below

18 incorporates the changes presented by the parties at the fairness hearing. It also

19 assumes, as counsel currently anticipate, that there will sufficient funds to satisfy

20 all claims made, the class administration costs, and that additional payments to

21 non-claimants will be made.

22

23 After the claimants are paid out of the Alleged Diminished Value Fund and

24 the Cash-in-Lieu-of-BOS Fund, any excess will go toward satisfying the costs of

25

1 class administration.¹¹ After those are satisfied, the residual will be directly
2 distributed to class members who did not file claims. Initial settlement checks will
3 be sent, and by their terms will expire after 90 days. Thereafter, the settlement
4 administrator will send a second settlement check, also good for 90 days, to any
5 class member who does not cash or deposit his or her first settlement check. A
6 reminder notice will be sent to any class member who does not cash or deposit his
7 or her check after 60 days. Should any class member fail to cash or deposit his or
8 her second settlement check, those funds will be escheated pursuant to applicable
9 State law.¹²

10
11 As to both cash funds, the Settlement Agreement clearly recognizes the
12 central significance of the manifestation issue and its impact on the viability of the
13 claims of class members. The issue of manifestation under the laws of two states,
14 Florida and New York, is discussed at length in the Court's previous Order. (See
15 Docket No. 2496 at 8-30.) Protocols for this allocation are set forth in the record.
16 (Settlement Agreement, Ex. 16 (Docket No. 3342-1 at 289-97; see Berman Decl.
17 ¶¶ 96-100.) Notably, allocation is expressed in percentage terms and varies among
18 states based on the laws of those states. (Id.) Overall, at one end of a sliding scale
19 of recovery are class members in states that clearly do not require manifestation of
20 a defect to support a defect claim, who will receive the largest cash payments (100
21

22 ¹¹ This includes "the cost of Settlement notice and claims administration."
23 (§ II(B)(1).)

24 ¹² State escheat laws would allow a class member to claim payments for a
25 number of years. See generally, Cal. Code Civ. Pro. §§ 1500-82 (California's
Unclaimed Property Law ("UPL")).

1 percent). (Id.) At the other end of that sliding scale are class members in states
2 that clearly require defects to be manifested, who will receive the smallest cash
3 payments (30 percent). (Id.) Class members in states where the law is unclear as
4 to this requirement will receive cash payments in between the two (70 percent).
5 (Id.)

6

7 In their Reply, aided by information received from the class administrator,
8 Plaintiffs suggest changes to the Allocation Plan that reduce the practical
9 significance of this distinction, at least as to class members who file claims.
10 Specifically, based on the current claims rate, it is anticipated that payments to
11 class members who have filed claims in manifestation-required and “unclear”
12 jurisdictions are likely to be paid at the full 100 percent rate (rather than at the
13 reduced 30 percent and 70 percent rate). (Pltfs.’ Reply (Docket No. 3731) at 3-4.)
14 This is anticipated for claims against both funds.¹³ Moreover, as indicated at the
15 fairness hearing, as to the Alleged Diminished Value Fund, it is anticipated that
16 claims filers will receive 100 percent of the value of their claims.¹⁴

17

18 C. Scope of Release

19

20 The Settlement Agreement contains a broad release provision, releasing

21

22 ¹³ Class members who fail to file claims will still be subject to this sliding
23 scale.

24 ¹⁴ As noted *infra* section V.D.1, the fund represents 42 percent of the total
25 loss to the class as calculated by Plaintiffs’ expert. Class members who file claims
will receive a higher percentage of their actual loss than will non-claimants.

1 Toyota from claims that were or that could have been brought in the present multi-
2 district litigation (“MDL”):
3

4 In consideration for the Settlement, Class Representatives,
5 Plaintiffs and each Class Member, . . . finally and forever release,
6 [Toyota and associated entities and individuals] from . . . any claim . . .
7 arising from, related to, connected with, and/or in any way involving the
8 Actions, the Subject Vehicles, any and all claims involving the ETCS,
9 any and all claims of unintended acceleration in any manner that are, or
10 could have been, defined, alleged or described in the [operative
11 pleadings filed in the present MDL], including, but not limited to, the
12 design, manufacturing, advertising, testing, marketing, functionality,
13 servicing, sale, lease or resale of the Subject Vehicles.

14
15 (§ VI(B).) Notwithstanding this broad release provision, the Settlement Agreement
16 expressly preserves each class member’s claims for personal injury, wrongful
17 death, or actual property damage:

18
19 Notwithstanding the foregoing, Class Representatives, Plaintiffs
20 and Class Members are not releasing claims for personal injury,
21 wrongful death or actual physical property damage arising from an
22 accident involving a Subject Vehicle.

23
24 (§ VI(C).)

1 IV. Legal Standards Applicable to Class Action Settlement Approval

2

3 A. Rule 23(e) Requirements

4

5 To protect the due process rights of absent class members, class action

6 settlements require the Court's approval. For a class judgment to bind an absent

7 class member, due process requires that the absent class members receive adequate

8 notice and representation by the class representative. See Richards v. Jefferson

9 County, Ala., 517 U.S. 793, 799-802 (1996); Phillips Petroleum Co. v. Shutts, 472

10 U.S. 797, 812 (1985); Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); Hanlon v.

11 Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir.1998); Moralez v. Whole Foods

12 Mkt., Inc., 897 F. Supp. 2d 987, 997 (N.D. Cal. 2012).

13

14 Consistent with this principle, Rule 23(e) of the Federal Rules of Civil

15 Procedure sets forth procedural requirements for approval of class action

16 settlements. The parties seeking approval must file a statement identifying the

17 terms of the settlement. Fed. R. Civ. P. 23(e)(3). Where, as here, a proposed

18 settlement would bind the class members, the Court must direct notice to the class

19 to be effectuated in a reasonable manner. Fed. R. Civ. P. 23(e)(1). Class members

20 must be given the opportunity to opt out of the settlement, and they must be given

21 the opportunity to file objections thereto. Fed. R. Civ. P. 23(e)(4)-(5). The Court

22 may approve a binding class settlement only if the Court finds that the proposed

23 settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

24

25 A discussion of how the proposed settlement meets these requirements is

1 discussed below.

2

3 B. Appropriateness of Continued Certification of the Class

4

5 The Court preliminarily certified the class, specifically finding that the class
6 was ascertainable and that it met the Rule 23(a) and Rule 23(b)(3) requirements for
7 class certification. (See generally Docket No. 3344.) Nothing has changed in the
8 five-month period between that preliminary class certification and today that
9 suggests to the Court that the class should be decertified. Accordingly, for the
10 reasons specified in the Order granting preliminary approval of the proposed
11 settlement, the Court certifies the Class for purposes of the Settlement. (See id. at
12 3-13.)

13

14 V. Evaluation of Rule 23(e) Requirements

15

16 A. Rule 23(e)(3) – Parties Must Identify the Terms of the Settlement

17

18 Plaintiffs filed a comprehensive Settlement Agreement, subject to the
19 Court's approval, with their Ex Parte Application for preliminary approval. The
20 Agreement incorporates a number of Exhibits thereto, including an Allocation
21 Plan. (Settlement Agreement Ex. 16 (Docket No. 3342-1 at 289-97.) The parties
22 amended their settlement agreement as noted *supra* section III.A.

23

24 As noted in Plaintiffs' Reply brief, and summarized *supra* section III.B.,
25 based on additional information now available from the settlement administrator,

1 Plaintiffs have at least tentatively altered the Allocation Plan. (Pltfs.' Reply
2 (Docket No. 3731) at 3-8.) Because the Allocation Plan is such an integral part of
3 effectuating the proposed settlement, the Court cannot conclude that the parties
4 have met their Rule 23(e)(3) burden to identify the terms of the settlement.

5

6 In so concluding, the Court notes that it is unsurprising that the Allocation
7 Plan has not been finalized. The present case involves millions of class members,
8 and the claims filing deadline of July 29, 2013, has not yet passed. Thus, the Court
9 does not fault the parties, their counsel, or the settlement administrator on this
10 point. In the coming weeks, the parties anticipate additional information will
11 become available that will assist them in more clearly defining the settlement
12 terms. At the fairness hearing, the Court set a schedule for additional briefing, set
13 a deadline for further objections by class members, and set the matter for further
14 hearing on July 19, 2013, at 9:00 a.m. (Docket No. 3787.)

15

16 B. Rule 23(e)(1) – Notice to the Class

17

18 The Court gave approval to the parties' plan for class notice when it
19 preliminarily approved the proposed settlement. (Docket No. 3345 at 5-7.) A
20 description of how notice to the class was effectuated is found in the declaration of
21 the settlement administrator. (See generally Sherwood Decl. (Docket No. 3559)
22 ¶¶ 6-17.) Among other sources, the settlement administrator used current address
23 data gathered from computerized account information from Departments of Motor
24 Vehicles in the United States using Vehicle Identification Number patterns of the
25 Subject Vehicles. (Id. ¶¶ 6-9.) Notices were mailed to more than 22 million

1 individuals. (Id. ¶ 10.) Another approximately 15,000 class notices were sent to
2 owners of fleet vehicles. (Id. ¶ 11.) Although a significant number of notices were
3 returned for bad addresses, after the settlement administrator performed address
4 searches and re-mailed the notices, the settlement administrator reports a 97
5 percent successful delivery rate. (Id. ¶ 14.)

6

7 In conjunction with direct notice by mail, other methods of notices were
8 employed. The settlement administrator set up an interactive website to provide
9 information and allow class members to file claims. (Id. ¶¶ 15-17.) The website
10 has generated significant traffic. As of April 19, 2013, over 365,000 electronic
11 claims were filed, and the website registered over 16 million “hits.” (Id. ¶ 17.)

12

13 The settlement administrator has also responded to in excess of 11,000 email
14 communications. (Id. ¶ 22.) Phone calls to a toll-free telephone number have
15 numbered over 186,000, with over 35,000 calls transferred to a live operator after
16 listening to an initial “frequently asked questions” (“FAQ”) option. (Id.)

17

18 Additionally, the parties mounted an aggressive paid media campaign to
19 provide notice. (See generally Kinsella Decl. (Docket No. 3561).) The Summary
20 Settlement Notice appeared in newspaper supplements, national consumer
21 magazines, and newspapers. (Id. at ¶¶ 13-15.) Additionally, significant internet
22 banner advertisements were also placed. (Id. at ¶ 17.) Combined, these
23 placements afforded class members hundreds of millions of opportunities to be
24 exposed to the Summary Settlement Notice. (Id. at ¶¶ 13-17.)

25

1 On these facts, the Court concludes that notice to the class was reasonable,
2 and that it meets the requirements of both Rule 23(e)(1) and due process of law.¹⁵
3

4 C. Rule 23(e)(4) – Opportunity to Opt Out and Rule 23(e)(5) –
5 Opportunity to Object

7 The over 22 million Short Form Notices sent to class members advise them
8 of the opportunity to exclude himself or herself from the settlement and to object to
9 the settlement; and that the deadline for doing so was May 13, 2013. (Sherwood
10 Decl. Exs. A-B.) It also directed class members to the settlement website for
11 complete information. (*Id.*)

12
13 The settlement website provides information on “Class Member Options,”
14 including the option to “Exclude yourself” from the settlement. The “FAQ”
15 portion of the website sets forth a straightforward procedure for opting out of the
16

17 ¹⁵ The Court agrees that the proposed changes to the Allocation Plan do not
18 require additional direct notice to the class. (See Pltfs.’ Reply at 8-11.) Here, as
19 explained above, changes to the Allocation Plan will either increase amounts paid
20 to class members who filed claims, provide benefits to non-claimants even though
21 they failed to comply with the requirements of filing a claim, or both. Where the
22 benefit to the class is increased by changes to proposed class action settlements,
23 courts have held that supplemental direct notice to the class is not required. See,
24 e.g., Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 641 (5th Cir.
25 2012), cert. denied, 133 S. Ct. 317 (2012); In re Integra Realty Res., Inc., 262 F.3d
1089, 1111 (10th Cir. 2001). This is so because an increase to a class member’s
recovery is not the type of change that would cause a class member to request
exclusion from the class settlement. See, e.g., Achtman v. Kirby, McInerney &

Squire, LLP

, 464 F.3d 328, 338 (2d Cir. 2006); Manners v. Am. Gen. Life Ins. Co.,
1999 WL 33581944, at *13 (M.D. Tenn. Aug. 11, 1999).

1 settlement. Class members were informed they could do so by mailing a letter
2 including basic information regarding themselves and their vehicle.

3

4 Likewise, the settlement website informs class members of the option to
5 “Object” or “Write to the Court about why you don’t like the proposed settlement.”
6 The settlement website FAQs explain the procedure for making objections.

7

8 Class members may also download a Long-Form Notice from the website.
9 The Long-Form Notice likewise explains the procedures for opting out and filing
10 objections. (Sherwood Decl. Ex. C.)

11

12 As of the Court-imposed deadline, 77 objections have been received, and
13 approximately 2,000 class members have elected to opt out of the settlement.
14 (Berman Reply Decl. (Docket No. 3722) Exs. A1-76 (copies of objections); Docket
15 No. 3743; Second Sherwood Decl. (Docket No. 3734) ¶ 8 & Ex. A (list of opt-
16 outs).)¹⁶

17

18 On these facts, the Court finds that the class members were sufficiently
19 advised of their rights to object to and to exclude themselves from the proposed
20 settlement.

21

22

23 ¹⁶ The settlement administrator received 26 late opt-out requests. The Court
24 is inclined to grant a five-day grace period and allow opt-out requests postmarked
25 on or before May 18, 2013, shall be considered timely. The Court adopted a
similar approach in filing objections made by pro se Objectors and received by the
Court in the days after the deadline.

1 D. Rule 23(e)(2) – Settlement Must be “[F]air, [R]easonable, and
2 [A]dequate”

3

4 1. *Hanlon* Factors

5

6 In evaluating fairness, the Court must consider and give approval to the
7 proposed settlement as a whole, rather than any individual provision therein.¹⁷ See
8 *Hanlon*, 150 F.3d at 1026-27. A number of factors govern the Court’s
9 consideration of the settlement:

10

11 the strength of the plaintiffs’ case; the risk, expense, complexity, and
12 likely duration of further litigation; the risk of maintaining class action
13 status throughout the trial; the amount offered in settlement; the extent
14 of discovery completed and the stage of the proceedings; the experience
15 and views of counsel; the presence of a governmental participant; and the
16 reaction of the class members to the proposed settlement.

17

18 *Id.* at 1026 (quoted and applied most recently in *Lane v. Facebook, Inc.*, 696 F.3d
19 811, 819 (9th Cir. 2012)). When the settlement precedes class certification,
20 settlement approval requires a “higher standard of fairness.” *Hanlon*, 150 F.3d at
21 1026. The reason for this is to ensure that counsel and named plaintiffs do not

22

23 ¹⁷ Nevertheless, the proposed settlement at issue here involves a number of
24 specific individual provisions. The Court’s discussion of the individual issues is
25 not meant to detract from its responsibility to give or deny final approval of the
settlement as a whole.

1 benefit themselves disproportionately at the expense of absent class members.
2 whose interests Id. at 1027.
3

4 The Court considers the Hanlon factors.
5

6 a. Strength of the Plaintiffs' Case
7

8 This factor considers both the likelihood of success on the merits and the
9 range of possible recovery. See Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 964-
10 65 (9th Cir. 2009). In considering the probability success on the merits, there is no
11 “particular formula by which that outcome must be tested.” Id. at 965. To the
12 contrary, the Court’s consideration of the likelihood of success on the merits is
13 “nothing more than an amalgam of delicate balancing, gross approximations and
14 rough justice.” Officers for Justice v. Civil Serv. Comm'n of San Francisco, 688
15 F.2d 615, 625 (9th Cir. 1982) (internal quotation marks and citation omitted).
16 Moreover, the Court need not “reach any ultimate conclusions on the contested
17 issues of fact and law which underlie the merits of the dispute, for it is the very
18 uncertainty of the outcome in litigation and avoidance of wasteful and expensive
19 litigation that induce consensual settlements.” Id. Because absolute precision is
20 impossible, “ballpark valuations” are the permissible, especially when reached
21 after mediated negotiation among non-collusive parties. See Rodriguez, 563 F.3d
22 at 965 (“We put a good deal of stock in the product of an arms-length,
23 non-collusive, negotiated resolution . . .”).
24

25 Plaintiffs have won a number of legal victories in the present MDL.

1 Although a number of their claims have been dismissed as not legally cognizable,
2 Plaintiffs have asserted a number of claims upon which they could ultimately
3 prevail. (See generally Docket Nos. 510 & 1414 (amended by Docket No. 1623).)
4 As discussed more fully below, their continued litigation is not without its risks,
5 but neither can the Court characterize Plaintiffs' case as weak. The Court believes
6 that the amount offered in settlement strikes an appropriate balance between the
7 strength of Plaintiffs' claims and the risks of continued litigation.

8

9 Initially, the Court notes that the sliding scale of recovery for class members
10 in manifestation, unclear, and non-manifestation states aids in accounting for the
11 varying strengths and weaknesses among the class as to state-law claims. In this
12 manner, the parties have attempted to make a first rough cut between Plaintiffs
13 with the strongest claims and Plaintiffs with weaker claims.¹⁸

14

15 Furthermore, the Alleged Diminished Value Fund is to be funded at 42
16 percent of the actual calculated diminished value on all Subject Vehicles sold or
17 exchanged within the sale window or the early lease termination window.¹⁹

18

19 ¹⁸ The changes proposed to the Allocation Plan eliminate this distinction for
20 those class members who filed claims. If the funds are sufficient to eliminate this
21 distinction and to pay each class member at the top of the sliding scale, the Court
22 does not believe doing so detracts from the reasonableness of the proposed
23 settlement. The Court's point here is that if such a distinction is necessary, it
24 strikes a permissible balance. Moreover, as the Court understands the current
25 proposal, this distinction will still be employed in calculating payments to non-
claimants.

19 ¹⁹ Plaintiffs' expert witness, Ernest H. Manuel, Jr., Ph.D., has set forth the
bases for this valuation. The Court finds this opinion is both reliable and relevant.

1 (Manuel Decl. (Docket No. 3560) ¶ 35; Berman Decl. ¶ 90.) This percentage
2 reflects a good balance of the strength of Plaintiffs' case and risks associated with
3 its weaknesses. Cf. In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir.
4 2000) (recovery of "roughly one-sixth of the potential recovery" was not unfair or
5 inadequate in light of "the difficulties in proving the case"); In re Critical Path,
6 Inc., C 01-00551 WHA, 2002 WL 32627559, *5 (N.D. Cal. June 18, 2002) (\$17.5
7 million settlement where damages alleged were \$200 million, resulting in 8.75
8 percent recovery percentage).

9
10 Class members eligible for BOS installation are to receive a specific remedy,
11 sought from the outset of this litigation, that is likely to increase the safety of their
12 vehicles and/or their confidence in the safety of their vehicles.²⁰ Class members
13 who instead participate in the Cash-in-Lieu-of-BOS Fund recover \$125 (at the top
14 of the sliding scale) based on a valuation of \$111.50 for such installation as
15 calculated by Plaintiffs' expert Michael Bonne.²¹ (Berman Decl. ¶ 90; Bonne Decl.
16 (Docket No. 3557) ¶ 10.) The Cash-in-Lieu-of-BOS Fund is funded at
17
18

19 See Fed. R. Civ. 702; Kumho Tire, 526 U.S. at 147; Daubert, 509 U.S. at 597.

20 This distinction highlights the differences in the parties' basic litigation
21 position. Plaintiffs contend SUA is caused by defects in the Subject Vehicles;
22 Toyota points to driver error, "sticky" accelerators, and floor mat entrapment as
23 potential causes. The settlement eliminates the need to resolve these hard-fought
disputes as to the class claims.

24 Like Plaintiffs' other experts, Michael Bonne has set forth the bases to
25 this valuation. The Court finds this opinion is both reliable and relevant. See Fed.
R. Civ. 702; Kumho Tire, 526 U.S. at 147; Daubert, 509 U.S. at 597.

1 approximately 25 percent of the possible recovery.²² (Bonne Decl. ¶ 10; Berman
2 Decl. ¶ 90; Ptlfs.' Reply at 14 n.34.) As is the case with the Alleged Diminished
3 Value Fund, this percentage reflects a good balance of the strength of Plaintiffs'
4 case and risks associated with its weaknesses.

5

6 The CSP provides significant coverage, benefits 16.1 million class members,
7 and is valued in excess of \$475 million. (Berman Decl. ¶ 93; Kleckner Decl. ¶ 11.)

8

9

10 On the whole, the Court finds that the proposed settlement is a reasonable
11 reflection of the strength of Plaintiffs' case and represents a significant proportion
12 of Plaintiffs' range of possible recovery. Thus, the Court finds this factor weighs
13 in favor of the settlement.

14

15 b. Risk, Expense, Complexity, and Likely Duration of
16 Further Litigation

17

18 Generally, "unless the settlement is clearly inadequate, its acceptance and
19 approval are preferable to lengthy and expensive litigation with uncertain results."
20 Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D.
21 Cal.2004) (quoting 4 A. Conte & H. Newberg, Newberg on Class Actions, § 11:50
22 at 155 (4th ed. 2002)). This general rule is amplified in class actions, and certainly
23 applies with great force to the present one. See Van Bronkhorst v. Safeco Corp.,

24

25 ²² Moreover, on current claims volume, it is anticipated that claimants will
receive the full \$125, regardless of the applicable jurisdiction.

1 529 F.2d 943, 950 (9th Cir. 1976) (“It hardly seems necessary to point out that
2 there is an overriding public interest in settling and quieting litigation. This is
3 particularly true in class action suits which are now an ever increasing burden to so
4 many federal courts and which present serious problems of management and
5 expense.” (footnote omitted)).

6

7 Unquestionably, the present litigation is complex. As Plaintiffs candidly
8 acknowledge, their chance of success is uncertain. (See Motion at 31-36.) In their
9 favor, Plaintiffs point to a demonstrable and statistically significant increased
10 chance of SUA in the Subject Vehicles and allude to evidence that Toyota was
11 aware of this and acted to conceal it. (Id. at 31.) Nevertheless, they also
12 acknowledge success at trial is not assured. (Id.) Moreover, Plaintiffs acknowledge
13 Toyota’s contention that SUA stems from driver error, and they acknowledge that
14 NHSTA’s investigations of SUA against other auto manufacturers have supported
15 this contention. (Id. at 31-32.)

16

17 Importantly, two interlocutory appeals are pending.²³ The first challenges
18 this Court’s holding that Plaintiffs have Article III standing to assert their claims
19 notwithstanding not having experienced an alleged actual incident of SUA. (See
20 Docket No. 1623.) A contrary ruling in favor of Toyota on the standing issue

21 ²³ These two interlocutory appeals are currently before the Ninth Circuit.
22 The first is In re: Certain Economic Loss Plaintiff v. Toyota Motor Corp., et al.,
23 11-57006, which has been ordered stayed pending this Court’s final approval of the
24 proposed settlement. (See 11-57006 Docket No. 56.) The second is In re Toyota
25 Motor Corp., et al., 12-55659. No formal stay has been entered on the docket of
that case, although counsel’s request to stay was filed December 27, 2012. (See 12-
55659 Docket No. 24.)

1 would drastically alter the present case, as it is reasonably assumed that a majority
2 of class members have not experienced an alleged incident of SUA. Also pending
3 is an appeal of the Court's Order denying Toyota's Motion to Compel Arbitration.
4 (Docket No. 2312.) A ruling in favor of Toyota on that issue would likewise
5 remove the claims of a majority of class members from the Court's docket.

6

7 Moreover, the Court ruled on the legal issue of whether it could order
8 injunctive relief in the form of repairs or adjustments to the Subject Vehicles, or
9 whether NHSTA's finding of the lack of defect could be held to preclude such an
10 order. (Docket No. 510 at 88-98.) A higher court could disagree with the Court's
11 ruling.

12

13 Significantly, despite the volumes of expert reports developed by the parties,
14 and despite repeated inspections and testing, Plaintiffs' experts have been unable to
15 replicate the phenomenon of SUA. (See Motion at 34.) The significance of this
16 fact cannot be overemphasized. Additionally, the proposed settlement was reached
17 prior to the Court's ruling on a number of motions to exclude Plaintiffs' expert
18 testimony. (Compare Docket No. 3332 (hearing set for January 11, 2013) with
19 Docket No. 3444-45 (preliminarily approving proposed settlement on December
20 28, 2012).) The uncertainty of whether those reports would ultimately be found to
21 be admissible further contributes to the risk of continued litigation.

22

23 Assuming Plaintiffs could clear these hurdles and receive judgment in their
24 favor, a lengthy appeal period would likely follow. The out-of-pocket costs in this
25 litigation have thus far totaled over \$30 million. The current attorney fee lodestar

1 approaches \$70 million. Extraordinary amounts in additional costs, and certainly
2 additional attorney time would be incurred in continuing to litigate.

Given these facts, the Court easily concludes that continuing the present litigation involves significant risk to the class. The class is not assured of prevailing on the merits. The litigation undeniably presents complex issues, at great expense, and there is no predicting the most likely outcome at the present stage of litigation. Continued litigation of Plaintiffs' claims is unlikely to be resolved quickly, and any resolution by this Court is likely to be the subject of an appeal. If the proposed settlement is not effectuated, resolution is likely to take years. Thus, the Court easily concludes this factor weighs in favor of settlement.

c. Risk of Maintaining Class Action Status Throughout the Trial

16 The Court approved a single class for settlement purposes. Absent
17 settlement, Toyota would likely oppose any motion for class certification and, as
18 noted by the Court in a previous Order, the laws of different states would likely
19 apply, necessitating multiple classes or subclasses of Plaintiffs. (See Order
20 Denying Plaintiffs' Motion for Application of California Law (Docket No. 1478.).)
21 Additionally, as to claims based on diminished value, Toyota stands prepared to
22 argue against one measure of damages for 20 different models of vehicles. (See
23 Motion at 35-36 (discussing the critique of Plaintiffs' expert report on damages
24 authored Toyota's expert Dr. Edward Lazear).)

1 Nevertheless, assuming Plaintiffs would be successful in a quest to have
2 some or all classes and/or subclasses certified, the Court could re-evaluate the
3 appropriateness of class certification at any time. See Fed. R. Civ. P. 23(c)(1)(c).

4

5 Moreover, a reversal on interlocutory appeal of the Court's ruling denying
6 the Motion to Compel Arbitration would completely fracture the class. The same
7 is true if the Ninth Circuit were to hold the class members who have not
8 experienced SUA lack standing to bring their claims.

9

10 Settlement avoids all possible risk. Thus, the avoidance of risk of
11 maintaining class action certification throughout trial favors settlement of this
12 action.

13

14 d. Amount Offered in Settlement

15

16 To assess whether the amount offered is fair, the Court may compare the
17 settlement amount to the parties' estimates of the maximum amount of damages
18 recoverable in a successful litigation. In re Mego Fin. Corp., 213 F.3d at 459.
19 While settlement amounts that are close to the plaintiffs' estimate of damages
20 provide strong support for approval of the settlement, a settlement that offers a
21 lesser amount of the potential recovery does not preclude a finding of fairness. Id.
22 (finding settlement amount constituting one-sixth of the potential recovery was fair
23 and adequate); see also Hanlon, 150 F.3d at 1027 (holding that the possibility that
24 the settlement amount could have been greater "does not mean the settlement
25 presented was not fair, reasonable or adequate."). "This is particularly true in cases

1 . . . where monetary relief is but one form of the relief requested by the plaintiffs.”

2 Officers for Justice, 688 F.2d at 628.

3

4 The amount offered in settlement is substantial, totaling in excess of \$1.375
5 billion in value to be allocated directly to the class, and totaling in excess of \$1.6
6 billion when separately negotiated fees and costs are added to that figure. As noted
7 in connection with the first and second Hanlon factors, the Court believes the
8 amount in settlement sufficiently accounts for both the strength of Plaintiffs’ case
9 and the risks associated with continued litigation. This factor weighs in favor of
10 settlement.

11

12 e. Extent of Discovery Completed and the Stage of the
13 Proceedings

14

15 Consideration of the extent of discovery and the current stage of the
16 litigation allows the Court to evaluate whether the parties are able to make
17 decisions about their claims based on information received during the discovery
18 process. See Linner v. Cellular Alaska P’ship, 151 F.3d 1234, 1239 (9th Cir.
19 1998); In re Cylink Sec. Litig., 274 F. Supp. 2d 1109, 1112 (N.D. Cal. 2003).
20 Where a settlement occurs in an advanced stage of the proceedings, this fact
21 supports a finding that the parties had the opportunity to investigate their claims
22 before resolving them. Alberto v. GMRI, Inc., No. Civ. 07-1895 WBS DAD, 2008
23 WL 4891201, at *9 (E.D. Cal. Nov. 12, 2008); Murillo v. Pac. Gas & Elec. Co.,
24 2:08-1974 WBS GGH, 2010 WL 2889728, at *8 (E.D. Cal. July 21, 2010).

1 Discovery was nearly completed at the time the proposed settlement was
2 reached. (See generally Berman Decl. ¶¶ 38-68.) The parties engaged in extensive
3 document discovery among themselves and third parties, including many types of
4 electronically stored documents. (Id. ¶ 38-56.) The parties' experts analyzed the
5 vehicle software and source code. (Id. ¶ 57.) The parties engaged over 40 expert
6 witnesses, and took over 200 depositions. (Id. ¶ 59-66.)

7
8 On this record, the Court concludes that all counsel had ample information
9 and opportunity to assess the strengths and weaknesses of their claims and
10 defenses. Accordingly, this factor weighs in favor of settlement.

11
12 f. Experience and Views of Counsel
13

14 This reliance is predicated on the fact that “[p]arties represented by
15 competent counsel are better positioned than courts to produce a settlement that
16 fairly reflects each party’s expected outcome in the litigation.” In re Pac. Enters.
17 Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995). The recommendations of counsel are
18 given great weight since they are most familiar with the facts of the underlying
19 litigation. Nat’l Rural Telecomm., 221 at 528. Additionally, where the services of
20 a private mediator are engaged, this fact tends to support a finding that the
21 settlement valuation by the parties was not collusive. See, e.g., Lusby v. Gamestop
22 Inc., C12-03783, 2013 WL 1210283, at *10 (N.D. Cal. Mar. 25, 2013); Villegas v.
23 J.P. Morgan Chase & Co., CV 09-00261 SBA (EMC), 2012 WL 5878390 at *6
24 (N.D. Cal. Nov. 21, 2012); Hartless v. Clorox Co., 273 F.R.D. 630, 641 (S.D. Cal.
25 2011).

1 Plaintiffs' counsel support the proposed settlement. (Motion at 42-43.)
2
3

4

5 g. Presence of a Governmental Participant

6 Although no governmental entity is a party to this action, the proposed
7 settlement nevertheless bears the silent imprimatur of government approval
8 because despite receiving notice, no state or federal official has filed an objection
9 to the proposed settlement.

10 Specifically, in accordance with the governmental notice provision of the
11 Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715(a)-(b), on January 4, 2013,
12 the settlement administrator gave timely notice of the proposed settlement to the
13 United States Attorney General, as well the Attorneys General for each state, and
14 the Attorney General for all possessions and territories of the United States.²⁴ (See
15 Sherwood Decl. ¶ 5; cf. Ex Parte Application for Preliminary Approval of
16 Settlement (Docket No. 3342, filed Dec. 26, 2012).)

17
18 “Although CAFA does not create an affirmative duty for either state or
19 federal officials to take any action in response to a class action settlement, CAFA
20 presumes that, once put on notice, state or federal officials will raise any concerns
21 that they may have during the normal course of the class action settlement

22
23

24 This CAFA provision has two time requirements. The first is a short time period for service of notice to government officials; the second requires the expiration of a 90-day period after notice before a Court may give final approval. See 28 U.S.C. § 1715(b) & (d). The 90-day waiting period expired April 2, 2013.

1 procedures.” Garner v. State Farm Mut. Auto. Ins. Co., CV 08 1365 CW EMC,
2 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010). To date, no state or federal
3 official has raised any objection or concern regarding the settlement.²⁵ Thus, even
4 though there is no governmental participant in the present action, the failure of any
5 Attorney General to object to the proposed settlement supports this Court’s final
6 approval of the proposed settlement.

h. Reaction of the Class Members to the Proposed Settlement

11 The absence of a large number of objections to a proposed class action
12 settlement raises a strong presumption that the terms of the settlement are favorable
13 to the class members. Nat'l Rural Telecomms., 221 F.R.D. at 529; In re
14 Omnivision Techs., Inc., 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008); see, e.g.,
15 In re Mego Fin. Corp., 213 F.3d at 459 (one objection out of a potential class of
16 5400); Churchill Village, LLC v. Gen. Elec., 361 F.3d 566 (9th Cir. 2004) (500
17 opt-outs and 45 objections out of approximately 90,000 notified class members).

19 As noted, class response has been overwhelmingly supportive of the
20 settlement. Although 22 million class notices were sent, fewer than 2,000 class
21 members have asked to be excluded, and fewer than 100 have filed objections to
22 the settlement. These numbers should be contrasted with the more than 422,000
23 claims submitted to the settlement administrator. (Second Sherwood Decl. ¶ 5.)

²⁵ Toyota so represents. (Toyota Reply (Docket No. 3728) at 2-3.) A review of the MDL docket reveals no objection filed by any government official.

1 This factor weighs in favor of approval of the settlement.

2

3 2. Ruling

4

5 All of the Hanlon factors favor settlement. The proposed settlement
6 represents a significant portion of what Plaintiffs could expect to receive if they
7 prevailed on the merits, and the decision to settle their claims in this manner
8 represents a reasoned assessment of the risk and expense of continued litigation.

9 After most discovery was completed, the proposed settlement was negotiated
10 between informed counsel with the assistance of an exceptionally able and
11 experienced Court-appointed professional mediator. The proposed settlement has
12 met with the presumed approval of over fifty governmental entities and of an
13 overwhelming majority of the class members who have made submissions to the
14 settlement administrator.

15

16 Accordingly, considering the Hanlon factors, the Court finds that the
17 proposed settlement is fair, reasonable, and adequate.

18

19 VI. Contribution to the Safety and Education Fund

20

21 As noted previously, one element of the proposed settlement is the
22 establishment of a \$30 million Safety and Education Fund.

1
2 Some objectors argue that this fund does not comply with Ninth Circuit
3 requirements regarding *cy pres* funds.²⁶ However, the initial \$30 million
4 contribution is not a *cy pres* contribution.

5
6 Not uncommon in class action settlements, *cy pres* is a shortened phrase that
7 refers to an ancient equitable doctrine “*cy près comme possible*,” translated from
8 the French to “as near as possible.” Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th
9 Cir. 2012). Pursuant to this doctrine, in class action settlements, federal courts
10 often authorize contributions, often charitable in nature, ““where the proof of
11 individual claims would be burdensome or distribution of damages costly.””
12 Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (quoting Six (6)
13 Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990)).
14 Such contributions are often made “in lieu of direct distribution of damages to
15 silent class members, [and] allows[] for aggregate calculation of damages, the use
16 of summary claim procedures, and distribution of unclaimed funds to indirectly
17 benefit the entire class.” Dennis, 697 F.3d at 865 (internal quotation marks and
18 citation omitted). Such contributions must “qualify as the next best distribution to
19 giving the funds directly to class members.” Id. (internal quotation marks and
20 citation omitted). To so qualify, such contributions must “retain[] some connection
21 to the plaintiff class and the underlying claims.” Id.

22
23
24

²⁶ Other objections address provisions related to *cy pres* distribution of
25 residual funds. Under the parties’ current proposal, those provisions have been
eliminated, and therefore those objections are moot.

1 Here, after the parties agreed to the establishment of two cash funds for the
2 class totaling \$500 million, they separately negotiated the establishment of the \$30
3 million Safety and Education Fund. (Plts.' Reply at 33; Toyota Reply at 22-23.)
4 In this manner, the initial \$30 million contribution did not diminish the cash
5 payments to the Class. It is not made in lieu of any payments to the class. Instead,
6 it is simply one part of a multi-part settlement of complex litigation that the Court
7 must consider as a whole.

8
9 Thus, the Court concludes the initial \$30 million contribution to the
10 Education and Safety Fund is not a *cy pres* fund. Objections on the basis that this
11 initial contribution does not comply with requirements for *cy pres* funds are
12 therefore lack merit.²⁷

13
14 **VII. Objections to Settlement**

15
16 A detailed listing of those objections is found on Exhibit A attached hereto.
17 Many of the objections were filed on the MDL Docket. Others were sent directly
18 to counsel and/or the settlement administrator. Class Counsel compiled a
19 comprehensive list of objections, regardless of whether they were filed with the
20 Court, sent to counsel, and/or sent to the settlement administrator. That
21 compilation is found in tabular form attached as Appendix A to the Plaintiffs'

22
23
24

²⁷ While the size of the initial fund is significant, it is dwarfed by the
25 balance of the settlement and does not materially diminish any portion of the
compensation class members will receive.

1 Reply. (See Docket No. 3731-1.)²⁸ Copies of all but four objections are attached
2 as Exhibits A1-76 to the Berman Reply Declaration. (Docket No. 3722-1 to 3722-
3 13.) An untimely objection from a disabled Objector appearing pro se was filed by
4 the Court,²⁹ and is found at Docket No. 3743. Three other objections were filed on
5 the date of the fairness hearing. (Docket Nos. 3788-3790.)

6

7 Although many of the objections fail to conform in all respects with the
8 procedure established for making them, the Court has nevertheless reviewed and
9 considered all the objections that are part of the record.³⁰ (Cf. Pltfs.' Reply at 12
10 n.24.) The Court has also considered a number of supplemental filings by
11 Objectors, including corrections to previous submissions, inadvertently omitted
12 exhibits, statements of non-objections, and in one instance, a filing styled as a
13 "surreply" brief. (See Docket Nos. 3608, 3619, 3667-68, 3683, 3708, 3741 &
14 3759.)

15

16 Generally, the objections either relate to the overall fairness and sufficiency
17

18 ²⁸ A complete listing of objectors is attached hereto as Attachment A.

19 ²⁹ This objection is untimely. Nevertheless, to accommodate the Objector's
20 described disability, the Court filed the objection, and granted leave to the Objector
21 to appear by phone.

22 ³⁰ Nevertheless, the Court strikes those portions of any objection that
23 purports to incorporate the objections raised by others in other documents. (See
24 Pltfs.' Reply at 56 & n. 171.) The Court's Preliminary Approval Orders
25 specifically required that "any objection [state] in writing and include . . . the
specific reasons why the Class member objects to the settlement (including any
legal support) [and] any evidence or other information the objecting Class Member
intends to rely on." (Docket No. 3345 at 9.)

1 of the settlement, or they address more specific elements of each of the four parts
2 of the proposed settlement, or they fall into a miscellaneous category. The Court
3 has already discussed issues related to one of these four parts – the *cy pres*
4 contribution – in the previous section. Below, the Court discusses objections
5 related to the overall fairness and sufficiency of the settlement, the three remaining
6 parts of the settlement, and a number of other objections that are not part of any
7 broader category.

8

9 A. Overall Fairness and Sufficiency of Settlement

10

11 A number of objections object to the settlement as insufficient to fully
12 compensate the class generally or to fully compensate them for specific damages.
13 As discussed *supra*, the Court has determined that the overall amount and basic
14 structure of the proposed settlement is fair, adequate, and reasonable.

15

16 As a general matter, inherent in the concept of settlement is trading a portion
17 of a *possible* recovery for the *certainty* of some recovery. This principle simply
18 highlights the inverse relationship between risk and reward. Settlement is born of
19 compromise, and settling plaintiffs trade the risk of recovering nothing for a
20 reward that is necessarily less than their full *potential* recovery. When a particular
21 tradeoff between the risk and the potential for reward is rationally made, and when
22 the resulting settlement is a fair, adequate, and reasonable result for the class, that
23 settlement is entitled to approval. This is true even when the class must be content
24 with a less than full recovery of their actual damages. As discussed *supra*, and as
25 acknowledged by Plaintiffs, the risk avoided by the proposed settlement should not

1 be understated. (See Plts.' Reply at 17-18.) Simply put, Plaintiffs might
2 eventually recover more with continued litigation, but they also might recover
3 nothing. The proposed settlement strikes a fair balance.

4

5 Moreover, and importantly for those Objectors who claim actual damages
6 for incidents of SUA, the proposed settlement has a carve out for such claims. It
7 expressly preserves "claims for personal injury, wrongful death or actual physical
8 property damage arising from an accident involving a Subject Vehicle." (§ VI(C).)
9 Thus, to the extent that a Plaintiff has been damaged based on an alleged actual
10 incident of SUA, the proposed settlement does not apply to his or her claims
11 arising from that incident. Such claims are not extinguished by the proposed
12 settlement, and any Plaintiff may continue to pursue recovery on an individual
13 basis.³¹

14

15 Thus, the Court concludes that these objections are without merit.

16

17 **B. Sale Window and Early Lease Termination Window**

18

19 Some objections addressed to the Alleged Diminished Value Fund relate to
20 the beginning or ending dates of the sale window and the early lease termination
21 window. These Objectors find themselves ineligible for participation in the
22 Alleged Diminished Value Fund because of the date they sold their vehicles or

23

24 ³¹ Although not precluding such recovery, neither does the proposed
25 settlement facilitate such recovery. Rather, it is incumbent upon each Plaintiff to
separately pursue his or her claim based on alleged actual incidents of SUA.

1 terminated their leases. Although the Court is not unsympathetic to their personal
2 accounts of the disposition of their vehicles, the appropriate sale window and early
3 lease termination window was determined by Plaintiffs' expert based on extensive
4 analysis and statistical evidence. (Manuel Decl. ¶¶ 18-19.) As noted *supra* at
5 footnote 19, the Court finds this evidence based on sound methodology, and no
6 Objector has given the Court reason to exclude Dr. Manuel's conclusions regarding
7 the media events and market forces or their combined (but temporary) effect on
8 secondary market resale value for the Subject Vehicles. (See generally id.)

9

10 At least one Objector seeks damages for anticipated future loss in value
11 when she sells or trades in her vehicle. Such damages are speculative.

12

13 The objections raised regarding the sale window and early lease termination
14 window lack merit.

15

16 C. BOS Installation and Cash-in-Lieu-of-BOS Fund

17

18 Some Objectors contend that BOS Installation provides no real benefit to the
19 class. It is first helpful to understand what is meant by a BOS installation, and
20 what it is not. Plaintiffs' expert explains that the BOS installation consists of a
21 "reflash" (or update) of the software in the engine control module ("ECM") of the
22 Subject Vehicles. (Bonne Decl. (Docket No. 3557) ¶ 7.) Thus, the "system"
23 referred to in the phrase "brake-override system" consists not of any particular
24 hardware installation; rather, it is the installation of a software "system" in the
25 ECM.

1 Moreover, it is also helpful to understand that in the context of the proposed
2 settlement, BOS installation is not meant as a cure-all for SUA. Instead, it is meant
3 to remedy a specific condition Toyota has long contended is related to reports of
4 SUA: floor mat entrapment. (Pltfs.' Reply at 22.) Ordinarily, drivers want the
5 vehicle to stop, or they want the vehicle to go. To effectuate their intent, they
6 apply the brake, or they apply the accelerator until the desired result is achieved.
7 In normal driving conditions, conflicting inputs from the brake pedal and
8 accelerator pedal simply should not ever occur. However, with a floor mat
9 entrapped under the accelerator pedal, when a rational driver applies the brakes to
10 stop, the ECM receives conflicting inputs. After BOS installation, these
11 conflicting inputs will result in a reduction of engine power. Thus, BOS
12 installation has a value to the class, and it remedies a known condition that has a
13 connection to SUA.

14

15 Nevertheless, BOS installation is not offered for all Subject Vehicles. For
16 instance, it is not offered for hybrid vehicles, including most notably all models of
17 the Toyota Prius. This is because a similar protection is already built into those
18 models. Thus, these vehicles already have the benefit offered by the BOS
19 installation component of the proposed settlement, and the decision not to extend
20 further benefits of this type is reasonable.

21

22 Still other Subject Vehicles will not be offered a BOS. Instead, they are
23 offered a cash payment in lieu of BOS, paid for all claimants and at the top of the
24 sliding scale for non-claimants at \$125. Some Objectors contend that these cash
25 payments do not fully compensate them or allow for installation of a BOS.

1 Plaintiffs' method of valuation is set forth in the Declaration of their expert, who
2 gathered data and arrived at an average flat rate charged by dealers for an ECM
3 reflash such as that required to complete the BOS installation contemplated by the
4 proposed settlement. (Bonne Decl. ¶¶ 8-10.) Considering that a BOS installation is
5 just a software update rather than installation of new parts or new systems in an
6 existing vehicle, its relatively minimal stated value is unsurprising.

7

8 Some Objectors contend it is unreasonable to provide them with this cash
9 valuation if Toyota itself cannot or will not provide a BOS installation to them.
10 However, class counsel represents that the Subject Vehicles identified for
11 participation in the Cash-in-Lieu-of-BOS Fund fall into two categories. (Pltfs.'
12 Reply at 22.) First are vehicles that "were not subject to the floor mat entrapment
13 recall," and thus, are not subject to the danger described above of simultaneously
14 application of brake and accelerator. For these vehicles, BOS installation would
15 not alleviate the known condition associated with SUA described above.
16 Therefore, the failure to offer a BOS installation on these Subject Vehicles is
17 understandable.

18

19 Second are vehicles "that do not have the capacity to accept the BOS reflash
20 without also replacing the engine control module." (Id.) Class counsel represent
21 that installation of BOS on these vehicles could be accomplished only by replacing
22 the ECM, which could be accomplished only at enormous cost. (Id.) Moreover,
23 because these vehicles are older, Toyota takes the position that its potential for
24 liability is low when one factors in its state-of-the-art defense that brake over-ride
25 systems were not in wide use at the times these vehicles were manufactured. (Id.)

1 Thus, as to these Subject Vehicles, it is likely that Toyota assessed as very low its
2 risk of liability, not warranting more than the negotiated compromise. As noted
3 above, just as settlements necessarily reflect a balancing of risk and reward for
4 plaintiffs, for defendants, they reflect a balancing of the risk of liability and the
5 cost of settlement. The Court finds this portion of the proposed settlement
6 represents a reasoned and reasonable compromise among the parties.

7

8 Thus, the Court finds that the objections related to the BOS installation and
9 the Cash-in-Lieu-of-BOS Fund lack merit.

10

11 D. Customer Support Program

12

13 Some Objectors contend the CSP lacks real value. However, as outlined,
14 this program provides specific, identifiable parts and systems subject to repair and
15 adjustments, including the ECM, cruise control switch, accelerator pedal assembly,
16 stop lamp switch, and throttle body assembly. (See § II(A)(5).) Protection extends
17 up to 10 years after expiration of existing warranties, and up to 150,000 miles.
18 (*Id.*) As noted *supra* footnote 10, the Court has found Plaintiff's expert valuation
19 of approximately \$475 million to be a helpful and reliable expert opinion, and no
20 evidence to the contrary has been presented.

21

22 Other objections discuss costs associated with past repairs to their vehicles
23 and object to the prospective nature of the repair or adjustments contemplated by
24 the CSP. Although the Court is not unsympathetic to these personal accounts of
25 increased past repair costs, it is entirely appropriate to structure as part of a

1 settlement a customer support program that applies only to future claims.
2 Importantly, as noted previously, any claims of property damage as a result of an
3 alleged actual incident of SUA are not extinguished by the proposed settlement.
4 (See *supra* section VI.A.) In contrast, past maintenance and repair charges were
5 not made part of the negotiated settlement and they are within the scope of the
6 release, as least to the extent they are related to SUA. Nevertheless, the failure of
7 the parties to include a term to compensate class members for past repairs does not
8 render the proposed settlement unreasonable. Indeed, such a term inviting review
9 of past repairs to over 16 million class vehicles would be difficult, if not
10 impossible, to implement, and would serve to multiply individual disputes rather
11 than resolve them on a classwide basis.³²

12

13 Accordingly, these objections lack merit.

14

15 E. Other Objections

16

17 1. Objections to Attorney Fees and Compensation of Named
18 Plaintiffs

19

20 Some Objectors contend the attorney fees and compensation of named
21 Plaintiffs. These objections are addressed in the concurrently filed Order
22 Regarding Motion for an Award of Attorneys' Fees, Reimbursement of Expenses,
23 and Compensation to Named Plaintiffs.

24

25 ³² Moreover, class members with past losses had the option of excluding
their claims from the proposed settlement.

1 2. Scope of Release

2
3 Some Objectors contend the release is too broad and releases claims
4 regarding the Subject Vehicles, including, for example, a claim related to gas
5 mileage. The Court disagrees, except as noted in the next section. The release is
6 broad, but it clearly limits itself to claims “regarding the subject matter of the
7 Actions.” (§ VI.B.) Gas mileage is not at issue in the present action.

8
9 Other objections relate to the inclusion of a waiver of rights protected by
10 California Civil Code § 1542, which preserves unknown claims: “A general
11 release does not extend to claims which the creditor does not know or suspect to
12 exist in his or her favor at the time of executing the release, which if known by him
13 or her must have materially affected his or her settlement with the debtor.” Class
14 settlements often waive this protection, and such waivers are not generally viewed
15 as an impediment to class settlement. See, e.g., Harris v. Vector Mktg. Corp.,
16 C-08-5198 EMC, 2011 WL 1627973, at *4 (N.D. Cal. Apr. 29, 2011); In re PFF
17 Bancorp. Inc., CV 08-01093-SVW PLAX, 2011 WL 4389323, at *6 (C.D. Cal.
18 Apr. 27, 2011); In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 227 F.R.D.
19 553, 569 (W.D. Wash. 2004) (Appendix § 6.2); Acosta v. Trans Union, LLC, 243
20 F.R.D. 377, 383 (C.D. Cal. 2007); In re Cisco Sys., Inc. Sec. Litig.,
21 C-01-20418-JW PVT, 2006 WL 6927885, at *8 (N.D. Cal. Sept. 12, 2006) Indeed,
22 in a case such as the present one, the Court is dubious as to whether the class
23 claims could be settled absent such a waiver.

24
25 The objections based on the scope of the release and the inclusion of the

1 § 1542 waiver lack merit.

2

3 3. Applicability of Release to Claims Asserted by Putative Class
4 in Hybrid Brake MDL

5

6 Two Objectors contend the release is too broad and applies to overlapping
7 issues between the present MDL and In re Toyota Motor Corp. Hybrid Brake
8 Marketing, Sales Practices, and Products Liability Litig., 8:10-ML-02172 (“Brake
9 MDL”). These objections are raised by are Objector James Daniel, represented by
10 Joseph Dunn (Docket 3733-3 at 65-73), and Objector David Gelber, represented by
11 Paul Paradis of Horowitz, Horowitz & Paradis (interim lead counsel in Brake
12 MDL) (Docket 3733-5 at 21-35).

13

14 Some of the same vehicles are at issue in both the Brake MDL and the
15 present MDL. Specifically, “Subject Vehicles” in the present MDL include the
16 2001 to 2010 models of the Toyota Prius. (Docket 3342-1 at 270.) At issue in the
17 Brake MDL are the 2004 to 2009 models of the Toyota Prius.

18

19 There also is arguably some overlap of substantive issues. The present MDL
20 relates to alleged defects causing SUA. The causes of SUA have not been
21 identified and, as noted previously, Plaintiffs’ experts have been unable to replicate
22 SUA. The Brake MDL relates to alleged defects in the anti-lock braking system
23 (“ABS”). The operative Consolidated Complaint in the present MDL refers in
24 passing to ABS Operation. (See Docket No. 2836 ¶ 137 (referring to a press
25 release regarding Prius ABS as an example of Toyota’s marketing campaign that

1 promised safety in the Toyota brand) & ¶ 366(4) (alleging that “ABS Operation”
2 and other “design character tics” “gave Toyota ‘definitive proof of root cause’ of
3 UA.).

4

5 In the proposed settlement of the economic loss claims, the release language
6 does not expressly carve out claims asserted in the Brake MDL. (Docket 3342-1 at
7 31-33.) On this specific point, the language of the release is ambiguous enough as
8 to be amenable to two contrary interpretations. In correspondence to class counsel
9 and Toyota settlement counsel, counsel for David Gelber proposes an express
10 carve out provision be added to the release in the proposed settlement. (3733-5 at
11 23.)

12

13 Class counsel responds to this objection by simply stating that they do not
14 believe that the release in the present MDL has any effect on the Brake Class
15 Action. (Ptlfs.’ Reply at 57.) Toyota takes the contrary position. (Toyota Reply at
16 32-35 (“Applying this standard, Gelber’s and Daniel’s claims are appropriately
17 released because the allegations in Prius Brakes overlap in several important
18 respects with those asserted in this case.”).)

19

20 As discussed at the hearing, through the efforts of counsel in the Brake MDL
21 and settlement counsel for Toyota, this issue is expected to be resolved shortly.
22 The parties have stipulated that Toyota agrees not to assert the release of claims in
23 the proposed settlement of the present MDL as a defense against any claim asserted
24 in the Brake MDL that is not based on diminution in value. That stipulation is
25 pending Court approval.

1 4. Claims Process

2

3 Some Objectors complain that the claims process should not be required.

4 Although the data used by the settlement administrator to provide notice to class

5 members was reliable, it also required additional refinement. (See, e.g., Second

6 Sherwood Decl. ¶ 8.) The requirement that class members download a claim form

7 or request in writing a claim form, complete the form, and mail it back to the

8 settlement administrator is not onerous. Additionally, in lieu of a written claim,

9 class members are given the what the Court considers the even less onerous option

10 of submitting an online claim. Moreover, as currently proposed, the class members

11 who cooperate in settlement with the minimal effort of providing basic information

12 salient to their claims will be rewarded in many instances with a greater portion of

13 settlement than non-claimant class members who merely sit and wait, and who may

14 receive a check in the mail. Therefore, these objections lack merit.

15

16 5. Standing

17

18 Other Objectors contend that Plaintiffs lack Article III standing. This Court

19 has discussed Article III standing at length, held that Plaintiffs did not lack

20 standing, and certified the Article III issue for interlocutory appeal. (See Docket

21 No. 1623.) The Court does not now revisit those rulings, and instead finds that the

22 objections based on standing lack merit for the reasons stated therein.

6. Objections Based on Disability

3 One Objector identifies himself as disabled and has suggested the settlement
4 ought to contain more outreach to the hearing impaired. He estimates that
5 approximately 1.8 million in the class are hearing impaired. (See Docket No.
6 3733-2 at 49-56.) The Court assumes the Objector proposes to accomplish this
7 through *cy pres* contributions. The parties have eliminated the *cy pres* contribution
8 aspect of the proposed settlement; thus, objections related to the subject matter of
9 those contributions are moot. As to the *cy pres* contributions that were
10 contemplated in the parties' previous proposal, although assistance to the disabled
11 is a noble cause, any focus through research or otherwise on the unique challenges
12 faced by hearing impaired drivers would tend to lack the required close nexus
13 between the class claims and *cy pres* contributions. See Nachshin v. AOL, LLC,
14 663 F.3d 1034, 1040-41 (9th Cir. 2011).

16 This Objector also advocates for large print class notices. (*Id.* at 56.) The
17 Court's examination of the notices reveals the print size was sufficient. Although
18 large print is easier to read for most people, the type size is adequate. A good deal
19 of information needed to be communicated to class members, and larger type
20 would likely render class notice via postcard infeasible, thus significantly
21 increasing mailing costs that already exceed \$6 million.

23 Thus, although raising valid points, this objection lacks merit in the sense
24 that the points raised do not detract from the proposed settlement.

1 7. Manifestation States

2

3 Some Objectors contend that no relief should be given to Plaintiffs who live
4 in the states that require manifestation of the defect. Currently, the Allocation Plan
5 sliding scale gives these Plaintiffs 30 percent of their base amount. Like other
6 portions of the proposed settlement, this term is simply the product of compromise.
7 It settles weaker, riskier claims for about one-third the amount of stronger, less
8 risky claims. That the Objectors may have made another bargain is beside the
9 point; settling parties need not find the most ideal terms. Moreover, had the parties
10 completely excluded class members in manifestation states, class counsel would be
11 challenged as abandoning a significant portion of the class with weaker claims in
12 order to effectuate settlement for the portions with stronger claims. The Court
13 believes that the parties struck an appropriate balance. The parties need only agree
14 to terms that are “fair, adequate, and reasonable,” and the Court finds that they
15 have. Objections based on the distinctions made in the Allocation Plan regarding
16 the manifestation requirement lack merit. Moreover, the revised Allocation Plan
17 will in all likelihood eliminate the discounts for class members who file claims.

18

19 8. Ohio and Pennsylvania

20

21 Relatedly, these Objectors also object to the Allocation Plan’s identification
22 of Ohio and Pennsylvania as non-manifestation states, which they contend is at
23

24

25

1 odds with the law of the case.³³ In its June 8, 2011, Order, the Court identified
2 Ohio and Pennsylvania as examples of states which would require manifestation of
3 a defect prior to any recovery by a plaintiff. See In re Toyota Motor Corp.
4 Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig., 785 F.
5 Supp. 2d 925, 932 (C.D. Cal. 2011) (relying on Velotta v. Leo Petronzio
6 Landscaping, Inc., 69 Ohio St. 2d 376, 379 (1982) (“In a case such as this, where
7 the wrongful conduct complained of is not presently harmful, the cause of action
8 does not accrue until actual damage occurs.”), and Angus v. Shiley Inc., 989 F.2d
9 142, 147 (3d Cir. 1993) (finding that the Pennsylvania Supreme Court would find
10 “no basis for relief” stated in the complaint where plaintiff’s heart valve was
11 allegedly defected but had manifested no defect)).

12
13 Plaintiffs’ counsel contend that other authority in Ohio and Pennsylvania
14 reveal otherwise. (Pltfs.’ Reply at 43-44 & nn. 128-29 (citing cases).) Without an
15 exhaustive inquiry into this question, the Court notes that, upon examination of the
16 authority cited by Plaintiffs, there is a sufficient foundation for Plaintiffs’ good
17 faith position that Ohio and Pennsylvania are properly classified as non-
18 manifestation states.³⁴ Thus, this point does not render the Allocation Plan unfair,
19

20 ³³ Characterizing the Court’s discussion of this issue as “law of the case,”
21 overstates its importance, which the Court views as non-binding dicta. Therein,
22 denying a motion to apply the law of California to a nationwide class, the Court
23 made the point, by way of example, that other states were not so generous to
consumers, and that a number of states, including Ohio and Pennsylvania, would
require manifestation of a defect prior to permitting claims.

24
25 ³⁴ The Court also notes the lack of any other objections regarding the
parties’ classification of states as manifestation, unclear, or non-manifestation

1 inadequate, or unreasonable.

2

3 These objections are therefore without merit.

4

5 **VIII. Conclusion**

6

7 The Court believes that the proposed settlement is in broad measure fair,

8 adequate, and reasonable. Having considered the objections, the Court finds that

9 they lack merit and do not preclude final approval. Nevertheless, the difficulties

10 with the Allocation Plan as it is currently drafted preclude final approval at this

11 time. Accordingly, the Court holds in abeyance the Motion for Final Approval of

12 Class Action Settlement.

13

14 **IT IS SO ORDERED.**

15

16 DATED: June 17, 2013

17

18 
JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

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states.

ATTACHMENT A: TABLE OF OBJECTORS

**IN RE: TOYOTA MOTOR CORP.
UNINTENDED ACCELERATION
MARKETING, SALES PRACTICES, AND
PRODUCTS LIABILITY LITIGATION**
This Document Relates to:

ALL ECONOMIC LOSS ACTIONS

Case No. 8:10ML2151 JVS (FMOx)

**Copies of the Objections Referenced Below
Appear on the MDL Docket at Docket Nos.
3722-1 to 3722-13, 3743 & 3788-3790. _____**

No.	Objector	Model/ Year
1	Abrazado, Charmain	2007 Scion TC
2	Anderson, Randy	2007 FJ Cruiser
3	Ashcom, Timothy	2009 Scion xB
4	Baker, Carolyn A.	2007 Sequoia
5	Bandas, Robert	2007 FJ Cruiser
6	Boles, Angela Harris, Wayne Rainwater, Julie	2010 Camry 2005 Tacoma 2008 Tundra
7	Barretta, Lucy	2009 & 2010 Corolla
8	Berkely, Joy Moroz, Lisa	2010 RAV4
9	Bernstein, Jerome (Estate of)	2010 Corolla
10	Blake, Cindy	2002 4Runner
11	Blake, Donna	2002 Camry
12	Bouganim, Hara Ann	2002 Prius
13	Cakarcan-Saboo, Gamze	2005 Corolla
14	Campos, Manuel & Yenisei	2006 Camry
15	Falls Auto Gallery Tracy Sivillo	15 vehicles
16	Carpenter, Darrel L.	2005 Tacoma
17	Clinch, Peter	2007 FJ Cruiser
18	Ranieri, Ameila Huang, Housan	2007 Lexus ES350 2005 Camry
19	Colburn, Debora	2009 Tacoma
20	Compton, Louis Robert	2006 Camry
21	Cooper, Robert	2009 Corolla
22	Copeland, Christi	2004 4Runner
23	Daniel, James	2009 Prius
24	Dannemiller, Barbara	2006 Tundra
25	Davis, Sidney	2002 Camry
26	Ducote, Dan	2010 Sequoia
27	Egge, Brian	2008 Prius
28	Evans, John	2000 Tundra
29	Everitt, Deborah	2005 Prius

No.	Objector	Model/ Year
30	Ezenwa, Austin	2006 4Runner
31	Gelber, David	2006 Prius
32	Gerwer, Alex	2005 Prius
33	Gibson, Dennis Cozby, Laura	2006 Lexus GX 2010 Lexus RX 2007 Lexus RX
34	Gikas, Olga	2007 Camry Hybrid
35	Goodrow, Rita	2010 Prius
36	Green Taxi	2006 Prius
37	Howard, Nantawan	2009 Lexus IS250C
38	Jackson, Donald & Debra	2004 Camry Solara 2007 Camry Solara
39	Joseph, Joy Karotukunl	2009 Camry
40	Juan, Victorino	2010 Camry
41	Ledbetter, Kennon & Kim Trinity, AL	Not identified
42	Lombardi, Anthony	Un-named Lexus
43	Lowe, Janette R.	2010 Yaris
44	Mehdiratta, Sharda	Lexus ES-300
45	Murray, Donna	2005 Camry
46	Neumann, Erich	2008 FJ Cruiser
47	Parnell, Carolyn	2002 Camry
48	Carpenter, David Tyler, Vondell Piazza, Jill Piazza, Betty Piazza, Stephen	2002 Camry 2006 Avalon 2010 Lexus ES 350 2002 Lexus ES300 2003 Corolla 2010 Corolla 2002 Tundra
49	Pepski, Jeffrey	Lexus ES350
50	Rodman, Scott	2003 Lexus ES 300
51	Rollins, David Baton Rouge, LA	2009 Prius and prior 2005 Prius
52	Saba, Robyn & Charles	2008 Avalon
53	Senatore, Henry & Eileen	Unstated
54	Smith, Ruby	2005 Avalon
55	Snyder, Roger Weeks, Linton Stone	2006 Prius 2007 Avalon 2007 Prius 2010 Prius
56	Thomas, Ann	2002 Lexus LS
57	Trump, Stephen	2008 Tacoma
58	Walter, Andrew	2009 RAV4
59	Waltman, Lora Louise	2009 RAV4
60	Wenzel, Donald & Mary Ann	2005 Camry
61	Williams, Pamela	Lexus ES350
62	Nelson, Isaiah	2008 Camry
63	Tuzzo, Michael	2006 Avalon

No.	Objector	Model/ Year
64	Roberts, Eileen Patel, Jagubhai Collins, Candice	2008 Solara 2006 Sienna 2005 Scion TC
65	Guerriero, Gary & Rebecca	2008 Scion XB
66	Howell, Brenda Morrison, Clarence	2005 Camry 2005 Prius
67	Serafino, Victor	2008 Lexus ES350
68	Leonard, Lorraine	2004 Camry
69	Richter, Susan	2005 Camry
70	Pattaniak, Ladukesh	2008 Lexus LS
71	Murrell, Sheila	2005 Camry
72	Cirillo, Patricia	2003 Camry
73	Gilland Roby, Erin	2005 Prius
74	Ray, Chaitali	2005 Corolla
75	Lin T. Ly Margaret Strohlein	2007 Scion 2005 Camry
76	Mingduan Lin	2009 Corolla
77 (Docket No. 3742)	Diane Krock	2007 Camry
3788	Melinda and Kurt Wieland	2005 Toyota Sienna
3789	Daniel J. Wood	2004 Camry
3790	William McCarter	2009 Scion TC

ATTACHMENT B: SETTLEMENT VALUATION

Settlement Component	Amount	Source
Qualified Settlement Fund - Alleged Diminished Value Fund	\$250,000,000	Settlement Agreement § II(A)(2).
Qualified Settlement Fund - Cash Payment in Lieu of BOS Fund	\$250,000,000	Settlement Agreement § II(A)(4).
Estimated Value of BOS Installation on Eligible Subject Vehicles	\$399,334,685	Bonne Decl. ¶ 10 (\$111.50 per vehicle); Motion at 29 (3,581,477 vehicles); Pltfs.' Reply at 24 & n.61 (3,581,477 x \$111.50 = \$399,334,685).
Estimated Value of Customer Support Program	\$477,541,000	Kleckner Decl. ¶ 11 & Ex. C.
Total Settlement Value to be Distributed Directly to the Class	\$1,376,875,685	
Automobile Safety and Education Fund	\$30,000,000	Settlement Agreement § II(A)(6)
Total Settlement Value Before Attorney Fees, Out of Pocket Expenses ("Costs"), and Compensation to Named Plaintiffs	\$1,406,875,685	
Attorney Fees	\$200,000,000	Settlement Agreement § VII(A)
Costs	\$27,000,000	Settlement Agreement § VII(A)
Compensation to Named Plaintiffs	\$395,270	Settlement Agreement § VII(E) (setting rate); <u>see</u> concurrently filed Order Regarding Motion for Attorneys' Fees, Reimbursement of Expenses, and Compensation to Named Plaintiffs for calculation.
Total Settlement Valuation	\$1,634,270,956	

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3 **ATTACHMENT 2**

4 **Attorney Fee Order (MDL Docket No. 3802)**

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: Toyota Motor Corp.
Unintended Acceleration Marketing,
Sales Practices, and Products Liability
Litigation

This document relates to:

All Economic Loss Cases.

Case No. 8:10ML 02151 JVS (FMOx)

Order Regarding Motion for
Attorneys' Fees, Reimbursement of
Expenses, and Compensation to
Named Plaintiffs

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1 Presently before the Court is a Motion filed by the Economic Loss Plaintiffs
2 (“Plaintiffs”) seeking an award of attorney fees, reimbursement of expenses, and
3 compensation to named plaintiffs and class representatives. (Docket No. 3563.) A
4 number of objections to the proposed award of fees, costs, and compensation have
5 been filed.¹ Plaintiffs have filed a Reply brief in support of the Motion. (Docket
6 No. 3732.) Pursuant to the Settlement Agreement, Toyota² does not oppose the
7 Motion.

8
9 As set forth more fully below, the Court tentatively finds that the proposed
10 award of fees, costs, and compensation is fair, reasonable, and adequate. However,
11 the Court cannot complete its analysis before granting final approval of the
12 proposed settlement agreement. Accordingly, and with the following discussion,
13 the Court holds in abeyance the Motion for an Award of Attorneys’ Fees,
14 Reimbursement of Expenses, and Compensation to Named Plaintiffs.

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¹ The objections pertaining to the proposed award of fees, costs, and compensation are discussed *infra*. At the fairness hearing on June 14, 2013, none of the objectors who appeared addressed the Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Compensation to Named Plaintiffs.

² The Settlement Agreement defines “Toyota” as “Toyota Motor Corporation and Toyota Motor Sales, U.S.A., Inc.” (Settlement Agreement § I(47).) Throughout this Order, the Court uses the term as it is defined by the parties.

1 I. Background

2

3 On December 28, 2012, on application from the Economic Loss Plaintiffs,
4 this Court granted preliminary approval to a proposed settlement agreement.³ (See
5 Docket Nos. 3344-45.) After preliminary approval, the parties amended two terms
6 of the proposed settlement agreement relating to the circumstances under which the
7 funds might flow into each other. (Docket No. 3424.) Moreover, in their Reply,
8 based on new information regarding the claim filing rates, Plaintiffs outlined
9 changes to the plan of how to allocate the two cash settlement funds. On the
10 morning of the fairness hearing, the parties presented a further refinement on the
11 allocation issue. The terms of the settlement agreement, as amended, are
12 summarized in a separate Tentative Order Regarding Proposed Class Action
13 Settlement.

14

15 Under the Settlement Agreement,⁴ Toyota has agreed to pay to Plaintiffs'
16 class counsel ("class counsel"), separately from the settlement funds, "an award of
17 Attorneys' Fees and Expenses in the Actions in the amount of \$200 million in fees,
18 plus up to an additional \$27 million in expenses incurred prior to the Fairness

19

20

21 ³ The proposed settlement agreement was reached with the assistance of
22 Court-appointed Settlement Special Master Patrick A. Juneau. (See Docket No.
23 2462.)

24 ⁴ The Settlement Agreement is attached as an unenumerated Exhibit to
25 Plaintiffs' Ex Parte Application for preliminary approval of the settlement. (See
Docket No. 3342-1 at 1-56.) The Settlement Agreement is also available at the
settlement website, www.toyotaelsettlement.com.

1 Hearing in the Actions.” (Settlement Agreement § VII(A).)⁵ Class counsel may
2 also “petition the Court for incentive awards of up to \$100.00 per hour per Plaintiff
3 and per Class Representative for their time in connection with the Actions, with a
4 \$2,000 minimum award,” which Toyota has agreed to pay. (Id. § VII(E).) In this
5 Order, the Court addresses only whether the proposed award of fees, costs, and
6 compensation is fair, reasonable, and adequate.

7

8 **II. Attorney Fees**

9

10 **A. Legal Standard**

11

12 A lawyer who recovers “a common fund for the benefit of persons other than
13 himself or his client” is entitled to reasonable attorney fees from the fund as a
14 whole. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); Staton v. Boeing
15 Co., 327 F.3d 938, 967 (9th Cir. 2003). The Supreme Court has explained the
16 rationale underlying the “common fund doctrine” as follows:

17

18 [P]ersons who obtain the benefit of a lawsuit without contributing to its
19 cost are unjustly enriched at the successful litigant’s expense.
20 Jurisdiction over the fund involved in the litigation allows a court to
21 prevent this inequity by assessing attorney’s fees against the entire fund,

22
23 ⁵ Under the Settlement Agreement, if the Court awards an amount less than
24 \$227 million in fees and costs, Toyota would pay the remainder to the Automobile
25 Safety and Education Program Fund. (Settlement Agreement § VII(B).) However,
for the reasons discussed herein, the Court is inclined to award the entire proposed
amount.

1 thus spreading fees proportionately among those benefited by the suit.
2

3 Van Gemert, 444 U.S. at 478 (citation omitted). Accordingly, “in common fund
4 cases, a variant of the usual rule applies and the winning party pays his or her own
5 attorneys’ fees.” Staton, 327 F.3d at 967.

6

7 In a common fund case, the court has discretion to use either a percentage or
8 lodestar method to determine attorney fees.⁶ Hanlon v. Chrysler Corp., 150 F.3d
9 1011, 1029 (9th Cir. 1998). The percentage method requires the court simply to
10 determine what percentage of the fund would provide class counsel with a
11 reasonable fee under all the circumstances. Id. The Ninth Circuit “has established
12 25% of the common fund as a benchmark award for attorney fees.” Id. However,
13 “[t]he benchmark percentage should be adjusted, or replaced with a lodestar
14 calculation, when special circumstances indicate that the percentage recovery
15 would be either too small or too large in light of the hours devoted to the case or
16 other relevant factors.” Six (6) Mexican Workers v. Ariz. Citrus Growers, 904
17 F.2d 1301, 1311 (9th Cir. 1990); Vizcaino v. Microsoft Corp., 290 F.3d 1043,
18 1048 (9th Cir. 2002) (“The 25% benchmark rate, although a starting point for
19 analysis, may be inappropriate in some cases.”). A “mechanical or formulaic
20 application” of the percentage method is inappropriate “where it yields an
21 unreasonable result.” In re Coordinated Pretrial Proceedings in Petroleum Prods.

22

23 ⁶ “Despite this discretion, use of the percentage method in common fund
24 cases appears to be dominant.” In re Omnitvision Techs., Inc., 559 F. Supp. 2d
25 1036, 1046 (N.D. Cal. 2007); see also In re Activision Sec. Litig., 723 F. Supp.
1373, 1378-79 (N.D. Cal. 1989) (discussing advantages of percentage method).

1 Antitrust Litig., 109 F.3d 602, 607 (9th Cir. 1997) [hereinafter Petroleum Prods.];
2 In re Critical Path, Inc., Sec. Litig., No. C 01-00551 WHA, 2002 U.S. Dist. LEXIS
3 26399, at *24 (N.D. Cal. June 18, 2002). Regardless of which method the court
4 uses, it must “explain[] its determination by written order or in open court.”
5 Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000).

6

7 The Ninth Circuit encourages courts to use the lodestar method as a “cross-
8 check” on the reasonableness of a fee award determined with the percentage
9 method. See Vizcaino, 290 F.3d at 1050; Petroleum Prods., 109 F.3d at 607 (“It is
10 reasonable for the district court to compare the lodestar fee, or sum of lodestar fees,
11 to the 25% benchmark, as one measure of the reasonableness of the attorneys’
12 hours and rates.”); Kakani v. Oracle Corp., No. C 06-06493 WHA, 2007 U.S. Dist.
13 LEXIS 95496, at *6 (N.D. Cal. Dec. 21, 2007). Indeed, this Court directed class
14 counsel to “submit a lodestar calculation for purposes of comparison and
15 validation.” (Docket No. 3344 at 23.)

16

17 To calculate the “lodestar,” the court must multiply the number of hours the
18 attorneys reasonably spent on the litigation by the reasonable hourly rate in the
19 community for similar work. McElwaine v. U.S. West, Inc., 176 F.3d 1167, 1173
20 (9th Cir. 1999). The court may raise or lower the lodestar based on several factors:
21

22 (1) the time and labor required; (2) the novelty and difficulty of the
23 questions involved; (3) the skill requisite to perform the legal service
24 properly; (4) the preclusion of other employment by the attorney due to
25 acceptance of the case; (5) the customary fee; (6) whether the fee is fixed

1 or contingent; (7) time limitations imposed by the client or the
2 circumstances; (8) the amount involved and the results obtained; (9) the
3 experience, reputation, and ability of the attorneys; (10) the
4 “undesirability” of the case; (11) the nature and length of the
5 professional relationship with the client; and (12) awards in similar
6 cases.

7

8 Fischel v. Equitable Life Assurance Soc'y, 307 F.3d 997, 1007 n.7 (9th Cir. 2002).

9 The court must be cautious, however, not to adjust the lodestar figure based on any
10 of the foregoing factors that are subsumed in the original lodestar calculation.

11 Morales v. City of San Rafael, 96 F.3d 359, 364 & n.9 (9th Cir. 1996). The Ninth
12 Circuit has noted that multipliers range from 1.0-4.0 and a “bare majority” fall
13 within the range of 1.5-3.0. Vizcaino, 290 F.3d at 1051 n.6; Van Vranken v. Atl.
14 Richfield Co., 901 F. Supp. 294, 298 (N.D. Cal. 1995) (“Multipliers in the 3-4
15 range are common in lodestar awards for lengthy and complex class action
16 litigation.”).

17

18 B. Discussion

19

20 Class counsel requests that the Court approve an award of attorney fees in
21 the amount of \$200 million. (Motion at 1.) According to Plaintiffs’ experts, the
22 total value of the Settlement Agreement exceeds \$1.6 billion.⁷ Therefore, the

23

24 ⁷ In determining the total settlement value, Plaintiffs’ experts appropriately
25 have included the non-monetary benefits – Brake Override System (“BOS”)
installations and operation of the Customer Support Program (“CSP”) – which can

1 requested fee award represents approximately 12.3 percent of the total settlement
2 value.

3

4 Although 12.3 percent of the common fund falls well below the 25 percent
5 benchmark, the Court must nonetheless consider whether this percentage should be
6 adjusted based on all the circumstances. See Six (6) Mexican Workers, 904 F.2d at
7 1311; Vizcaino, 290 F.3d at 1048. The Court will first consider several factors
8 approved by the Ninth Circuit for determining the reasonableness of a proposed fee
9 award. See Vizcaino, 290 F.3d at 1048-50. After that, the Court will use the
10 lodestar method as a “cross-check” on the reasonableness of the award. See id. at
11 1050.

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18 reasonably be valued. See Staton, 327 F.3d at 973-74; Hanlon, 150 F.3d at 1029.
19 Michael Bonne values the BOS installations, based on the average retail cost for
20 such an installation, at approximately \$400 million. (See Bonne Declaration
(Docket No. 3557) ¶ 10.) Kirk Kleckner values operation of the CSP at
21 approximately \$477 million. (Kleckner Decl. (Docket No. 3358) ¶ 11 & Ex. C.)
22 Valuation of the CSP was derived based on the market price of similar extended
23 service contracts offered in the industry. (Id. at ¶¶ 8-10, Ex. C) Finally, the \$1.6
24 billion valuation includes \$227 million in attorney fees and litigation costs,
25 compensation to named plaintiffs and class representatives, and the costs of notice
and administration. See Staton, 327 F.3d at 974; Johnston v. Comerica Mortg.
Corp., 83 F.3d 241, 246 (8th Cir. 1996) (construing attorney fees as “an aspect of
the class’ recovery”).

1 1. Results Achieved

2
3 “Courts have consistently recognized that the result achieved is a major
4 factor to be considered in making a fee award.” In re Heritage Bond Litig., No. 02-
5 ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *27 (C.D. Cal. June 10,
6 2005) (citing Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)); Vizcaino, 290 F.3d
7 at 1048 (“Exceptional results are a relevant circumstance.”).

8
9 Here, the total value of the Settlement Agreement exceeds \$1.6 billion,
10 making this one of the largest automobile class action settlements – if not the
11 largest – in history.⁸ Plaintiffs’ expert estimates total economic losses caused by
12 the alleged diminished value to be \$590 million. (Manuel Decl. (Docket No. 3560)
13 ¶ 35.) Based on this estimate, the \$250 million Alleged Diminished Value Fund
14 recovery constitutes approximately 42 percent of total economic losses.⁹
15 (Fitzpatrick Decl. (Docket No. 3564) ¶ 16.) The \$250 million contribution to the
16 Cash-in-Lieu-of-BOS Fund represents approximately 25 percent of the aggregate,
17 class-wide estimated average cost of a BOS installation, based on 9,020,154
18 eligible vehicles.¹⁰ (See Sherwood Decl. (Docket No. 3559) ¶ 9.) And class

19
20

⁸ At oral argument class counsel represented this settlement to be the largest
21 automobile class action settlement.

22 ⁹ This percentage-of-damages recovery is exceptional. See, e.g., In re
23 Cendant Corp. Litig., 264 F.3d 201, 241 & n.22 (3d Cir. 2001) (citing securities
settlements between 1.6 and 14 percent of damages).

24 ¹⁰ Subtracting 6,309,384 BOS-eligible vehicles and 1,325,314 hybrid
25 vehicles from the 16,654,852 universe of current registrations yields 9,020,154
vehicles. 9,020,154 eligible vehicles multiplied by the \$111.50 average BOS

1 members who submit eligible claims against the Cash-in-Lieu-of-BOS Fund may
2 recover 100 percent of the estimated value of a BOS, depending on the jurisdiction
3 in which they reside and the volume of claims.¹¹ Considering only these monetary
4 benefits, class counsel have achieved exceptional results for the class.

5

6 The non-monetary benefits for the class are also extremely valuable. Over
7 3.5 million class members who currently own or lease a qualifying vehicle will be
8 eligible to receive BOS. In monetary terms, this benefit is valued at approximately
9 \$400 million. (Bonne Decl. ¶ 10.) Furthermore, the Customer Support Program
10 will provide prospective coverage for repairs and adjustments needed to correct
11 defects in materials or workmanship in five components related to the acceleration
12 system. Over 16.1 million class members may benefit from the Customer Support
13 Program, which is valued at approximately \$477 million. (Kleckner Decl. ¶¶ 8-11
14 & Ex. C.)

15

16 As discussed in the following subsection, class counsel obtained these
17 benefits for the class while facing tremendous risks. By any measure, the results
18 achieved by class counsel are exceptional. This factor weighs strongly in favor of
19 approving the entire proposed fee award.

20

21

22 installation cost yields \$1,005,747,171. The \$250 million fund is approximately 25
23 percent of this number. (Motion at 9 n.37.)

24 ¹¹ Toyota's \$30 million contribution to the Automobile Safety and
25 Education Research Fund also will benefit class members, as discussed in the
Tentative Order Regarding Proposed Class Action Settlement.

2. Risks and Complexity of Litigation

Another significant factor to be considered in determining attorney fees is the risk that counsel took of “not recovering at all, particularly [in] a case involving complicated legal issues.” In re Omnivision Techs., 559 F. Supp. 2d at 1046-47; Vizcaino, 290 F.3d at 1048; In re Heritage Bond, 2005 U.S. Dist. LEXIS 13627, at *44 (“The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of costs, is a factor in determining counsel’s proper fee award.”).

There is no question that this litigation is complex. With respect to risks, the Court first notes that neither NASA nor NHTSA were able to identify a defect in the electronic throttle control system in the vehicles they tested. Accordingly, throughout the litigation, Toyota – represented by exceptionally skilled counsel – has argued that no defect exists. On this basis alone, class counsel faced an extremely difficult path. Nevertheless, they continued to pursue relief for the class, surviving a series of dispositive motions and eventually agreeing to settle for over \$1.6 billion.

Class counsel faced several other major risks in this litigation. Two interlocutory appeals are pending. The first challenges this Court’s holding that Plaintiffs have Article III standing to assert their claims notwithstanding not having experienced an actual alleged incident of SUA. (See Docket No. 1623.) The second challenges the Court’s order denying Toyota’s Motion to Compel Arbitration. (Docket No. 2312.) A ruling in favor of Toyota on either issue would drastically alter the present case by extinguishing the claims of a majority of class

1 members. Moreover, this Court ruled on the legal issue of whether it could order
2 injunctive relief in the form of repairs or adjustments to the Subject Vehicles, or
3 whether NHSTA's finding of the lack of defect could be held to preclude such an
4 order. (Docket No. 510 at 88-98.) A higher court could disagree with the Court's
5 ruling.

6
7 Furthermore, the Settlement Agreement was reached before the Court ruled
8 on a number of motions to exclude Plaintiffs' expert testimony. The uncertainty as
9 to the admissibility of Plaintiffs' expert reports, on which their claims heavily rely,
10 greatly contributes to the risks. Finally, if this litigation were to proceed all the
11 way to trial, the outcome would be uncertain and a lengthy appeal period likely
12 would follow.

13
14 The Court has not detailed all of the risks faced by class counsel throughout
15 this litigation. It is clear, however, based only on the risks discussed herein, that
16 this factor strongly supports the proposed fee award.

17
18 3. Skill of Counsel

19
20 Courts have recognized that the "prosecution and management of a complex
21 national class action requires unique legal skills and abilities." Knight v. Red Door
22 Salons, Inc., No. 08-01520 SC, 2009 U.S. Dist. LEXIS 11149, at *16 (N.D. Cal.
23 Feb. 2, 2009) (quoting Edmonds v. United States, 658 F. Supp. 1126, 1137 (D.S.C.
24 1987)). "The single clearest factor reflecting the quality of class counsels' services
25 to the class are the results obtained." In re Heritage Bond, 2005 U.S. Dist. LEXIS

1 13627, at *39-40 (quoting Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 149
2 (E.D. Pa. 2000)).

3
4 Throughout this litigation, class counsel consistently has demonstrated
5 extraordinary skill and effort. As discussed above, they faced numerous
6 challenges. Class counsel also led a massive discovery effort, which was necessary
7 to investigate and support their factually complex claims. The subject matter –
8 defects in Toyota’s electronic throttle control system for a myriad of vehicles over
9 more than ten years – is daunting and has required particular expertise.
10 Furthermore, this case involved difficult questions of law – state and federal,
11 procedural and substantive. Finally, class counsel faced an exceptionally skilled
12 adversary with substantial resources. See In re Equity Funding Corp. Sec. Litig.,
13 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Accordingly, this factor weighs in
14 favor of approving the entire proposed fee award.

15
16 4. Contingent Nature of the Fee

17
18 Attorneys are entitled to a larger fee award when their compensation is
19 contingent in nature. See Vizcaino, 290 F.3d at 1048-50; see also In re Omnivision
20 Techs., 559 F. Supp. 2d at 1047. “It is an established practice in the private legal
21 market to reward attorneys for taking the risk of non-payment by paying them a
22 premium over their normal hourly rates for contingency cases.” In re Wash. Pub.
23 Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994). This ensures
24 competent representation for plaintiffs who may not otherwise be able to afford it.
25 Id.

1
2 Here, class counsel have expended at least 165,930 hours and spent over \$27
3 million in litigation costs, all at the risk of receiving no compensation
4 whatsoever.¹² During the past three and a half years, class counsel dedicated an
5 exorbitant amount of time, energy, and resources to discovery, motion practice,
6 and other matters in this litigation. The work performed by class counsel is
7 summarized thoroughly in the Declaration of Steve Berman (Docket No. 3565) at
8 pages 1 through 38. Because of the demands of this litigation, class counsel have
9 forgone the business opportunity to devote time to other cases. See Vizcaino, 290
10 F.3d at 1050. This factor supports the proposed fee award.

11
12 5. Awards in Similar Cases
13

14 As noted above, the Ninth Circuit has established 25 percent of the common
15 fund as the benchmark for attorney fee awards. Plaintiffs' expert has conducted an
16 empirical study and found that, in 2006 and 2007, the most common fee
17 percentages awarded by all federal courts were 25 percent, 30 percent, and 33
18 percent. Nearly two-thirds of the awards were between 25 percent and 35 percent.
19 In the Ninth Circuit particularly, the most common percentages awarded were 25
20 percent, 30 percent, and 33 percent. (Fitzpatrick Decl. ¶ 20.) Furthermore, class
21 counsel cites several cases in which the total settlement values were extraordinarily

22
23 ¹² According to Steve Berman, class counsel have invested more than
24 \$69,706,936 in lodestar and \$30,606,117 in litigation costs. (Berman Decl.
25 (Docket No. 3565) ¶ 135.) In a survey of 688 class action settlements by
Plaintiffs' expert, in only one case did the class counsel advance more costs than
class counsel have advanced here. (Fitzpatrick Decl. ¶ 17.)

1 large and the fee awards were above 25 percent of the common fund. E.g., In re
2 TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, 2013 WL 1365900 (N.D.
3 Cal. Apr. 3, 2013) (awarding 28.5 percent of \$27.5 million settlement fund);
4 Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185 (S.D. Fla. 2006)
5 (awarding 31.3 percent of \$1.075 billion settlement fund); In re Vitamins Antitrust
6 Litig., MDL No. 1285, 2001 WL 34312839 (D.D.C. July 16, 2001) (awarding 34
7 percent of \$365 million settlement fund). Therefore, the Court finds that fee
8 awards in cases involving similar settlement values further support the proposed
9 fee award.

10

11 6. Reaction of the Class

12

13 The Court may also consider the reaction of the class to the proposed fee
14 award. In re Omnivision Techs., 559 F. Supp. 2d at 1048; In re Heritage Bond,
15 2005 U.S. Dist. LEXIS 13627, at *48 (“The presence or absence of objections
16 from the class is also a factor in determining the proper fee award.”). Here, over
17 22.6 million short form notices were mailed to class members and only 77
18 objections to the Settlement Agreement were filed. Of these 77 objections, only 20
19 relate to the proposed fee award. The Court addresses the substance of the
20 objections below. This generally favorable reaction of the class weighs in favor of
21 approving the proposed fee award.

22

23

24

25

1 7. Lodestar Cross-Check

2

3 “Calculation of the lodestar, which measures the lawyers’ investment of time
4 in the litigation, provides a check on the reasonableness of the percentage award.”
5 Vizcaino, 290 F.3d at 1050-51; In re Omnivision Techs., 559 F. Supp. 2d at 1048.
6 As noted above, the Ninth Circuit encourages courts to cross-check the
7 reasonableness of a fee award determined using the percentage method with the
8 lodestar method.

9

10 Here, a cross-check using the lodestar method confirms the reasonableness
11 of the proposed fee award. According to the Declaration of Steve Berman, class
12 counsel’s lodestar is \$69,706,936¹³ and their litigation costs are \$30,606,117, for a
13 total investment of \$100,313,053. (Berman Decl. ¶ 135.) Dividing the lodestar
14 into the \$200 million proposed fee award yields a multiplier of 2.87. This is within
15 the range approved by courts within this Circuit. Considering all the
16 circumstances, and particularly the tremendous risks undertaken by class counsel,
17 the Court finds that this multiplier is warranted. Thus, the lodestar method
18 confirms the reasonableness of the proposed fee award.

19

20

21

22 ¹³ Class counsel have expended at least 165,930 hours in this case. (See
23 generally Berman Decl.; Motion at 2, Appendix A (Summary of Firms Lodestar
24 and Costs).) The hourly rates of class counsel range from \$150 to \$950. Class
25 counsel’s experience, reputation, and skill, as well as the complexity of this case,
justify these hourly rates. See Prison Legal News v. Schwarzenegger, 608 F.3d
446, 455 (9th Cir. 2010).

C. Objections

As noted above, only 20 of the 77 objections filed relate to the proposed fee award.¹⁴ A detailed chart of the objections reviewed and considered by the Court is attached to the Tentative Order Regarding Proposed Class Action Settlement as Attachment A. The Court generally addresses the substance of the objections, without addressing each objection individually.¹⁵

All objectors to the proposed fee award contend that it is excessive. As a preliminary matter, the Court notes that none of the objectors have provided an expert declaration or any other evidence undermining the Court’s conclusions herein. Some objectors arbitrarily propose an alternative percentage of the common fund that should be used to determine the fee award. (Objection Nos. 9, 15, 48, 66, 67.) The Court has considered all the circumstances of the case and performed a lodestar cross-check, and concluded that the proposed fee award, which represents only 12.3 percent of the total settlement value, is fair, reasonable, and adequate. These unsupported objections do not convince the Court otherwise.

Some objectors contend that as a “mega-fund,” the percentage awarded to class counsel should be significantly lower than the 25 percent benchmark. (E.g.,

¹⁴ Objection Nos. 5, 9, 15, 18, 19, 21, 22, 26, 36, 37, 46, 48, 53, 58, 64, 65, 66, 67, 73, 75. (See Tentative Order Regarding Proposed Class Action Settlement, Attachment A.)

¹⁵ The Court cites objections herein using the numbers assigned to them in Attachment A to the Tentative Order Regarding Proposed Class Action Settlement.

1 Objection Nos. 5, 18, 64, 67.) First, the Court notes that the proposed fee award is
2 significantly lower than the benchmark. Regardless, there is no rule in the Ninth
3 Circuit that requires a court to decrease the percentage of a fee award as the size of
4 the settlement increases. Vizcaino, 290 F.3d at 1047 (rejecting the so-called
5 “increase-decrease rule”). Instead, the Court must consider the size of the fund as
6 “one relevant factor” in determining whether to adjust the percentage. Id.; see also
7 In re Wash. Pub. Power, 19 F.3d at 1297 (requiring the court to consider the size of
8 the fund). Here, the Court has considered the size of the fund and found that 12.3
9 percent of the total settlement value is a fair and reasonable fee award, particularly
10 in light of the risks and complexity of this litigation.¹⁶ Accordingly, these
11 objections lack merit.

12
13 Other objectors contend that the non-cash aspects of the Settlement
14 Agreement should not be considered in determining its total value. (Objection
15 Nos. 5, 21, 46, 65, 66, 67.) Because the non-cash benefits can reasonably be
16 valued, as indicated by Plaintiffs’ experts and discussed in footnote 7, *supra*, they
17 should be considered. Staton, 327 F.3d at 973-74; Hanlon, 150 F.3d at 1029. BOS
18 installations and the CSP have value. BOS is a safety innovation that will
19 automatically reduce engine power when the brake pedal and accelerator pedal are
20 applied simultaneously under certain driving conditions. CSP is essentially an
21 extended service contract, under which owners of Subject Vehicles will benefit
22 from extended coverage of certain components at issue in this litigation.

23 ¹⁶ The Court also agrees with Plaintiffs’ expert (Fitzpatrick Decl. ¶ 23), and
24 other courts, e.g., Allapattah Servs., 454 F. Supp. 2d at 1213, which have found
25 that decreasing a fee percentage based only on the size of the fund would provide a
perverse disincentive to counsel to maximize recovery for the class.

Accordingly, these objections lack merit.

A couple of objectors contend that the lodestar multiplier is too high.

(Objection Nos. 5, 67.) But as discussed above, considering all the circumstances of this litigation, particularly the risks, the multiplier – which falls within the range accepted by the Ninth Circuit – is appropriate. See Vizcaino, 290 F.3d at 1051-52 (providing table of commonly used multipliers). Other objectors request that the Court appoint an auditor or Special Master to audit the lodestar, or even request access to class counsel’s billing records. (Objection No. 9, 15, 18.) The lodestar is supported by the Declaration of Steve Berman, lead co-counsel, and the Court has no reason to doubt its accuracy. Furthermore, the lodestar is used here only as a cross-check on the percentage method. In a case such as this, where class counsel have expended at least 165,930 hours, the Court may rely on summaries and declarations in lieu of detailed records. E.g., In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions, 148 F.3d 283, 332 n.107 (3d Cir. 1998).

Accordingly, these objections lack merit.

Some objectors challenge the proposed contributions to the Automobile Safety Research and Education Fund. (Objection Nos. 36, 64.) Because the Court discusses this fund and objections to it in the Tentative Order Regarding Proposed Class Action Settlement, the Court does not discuss these objections here.

One objector contends that no attorney fees should be awarded because of collusion in agreeing to the proposed fee award. (Objection No. 65.) First, the Settlement Agreement, including the agreement as to fees and costs, was reached

1 after many months of arm's-length negotiations supervised by the Court-appointed
2 Settlement Special Master, Patrick Juneau. Second, as discussed above, the results
3 of the settlement are excellent for the class. Third, class counsel represents to the
4 Court that the parties reached their agreement as to attorney fees and costs
5 separately from the rest of the Settlement Agreement and subject to Court
6 approval. (See Berman Decl. ¶¶ 78-87.) There is no evidence of collusion and,
7 therefore, this objection lacks merit.

8

9 Finally, a few objectors contend that the notice did not adequately disclose
10 the specific amount of attorney fees and costs that class counsel would request.
11 (Objection Nos. 15, 46.) This is not true. The notice stated: "Class Counsel will
12 ask the Court for attorney fees not to exceed \$200 million, plus up to an additional
13 \$27 million in costs and expenses." It further stated: "Class Counsel will ask for
14 payments to each of the Plaintiffs and Class Representatives of \$100 per hour, with
15 a minimum of \$2,000 award, for their time invested in connection with the
16 Actions." (Short Form Notice ¶ 14.)

17

18 To the extent the Court has not specifically addressed any of the objections
19 that were filed, they lack merit. The Court has reviewed and considered all of the
20 objections.

1 D. Allocation of Fee Award

2

3 The Court may grant a lump sum award to be divided among class counsel

4 as they deem appropriate. The Court need not “specify what share of the common

5 fund award that each attorney [will] receive.” Six (6) Mexican Workers, 904 F.2d

6 at 1311; Hartless v. Clorox Co., 273 F.R.D. 630, 646 (S.D. Cal. 2011) (“[F]ederal

7 courts routinely affirm the appropriateness of a single fee award to be allocated

8 among counsel and have recognized that lead counsel are better suited than a trial

9 court to decide the relative contributions of each firm and attorney.”). But see In re

10 Critical Path, 2002 U.S. Dist. LEXIS 26399, at *25 (“The Court believes that the

11 better practice, for future cases, is to disclose the exact allocation proposed

12 between the firms.”).

13

14 If awarded, the attorney fees will be paid, collectively, to the 31 Plaintiffs’

15 firms that worked on the litigation. Class counsel propose that they allocate the

16 fees among the eligible Plaintiffs’ counsel in a manner that they believe, in good

17 faith, reflects the contributions of counsel to the prosecution and settlement of the

18 claims against Toyota. The Court tentatively approves this plan, as class counsel

19 are the most familiar with the amount of work actually contributed by each of the

20 31 firms.

1 E. Conclusion as to Attorney Fees

2

3 For the foregoing reasons, the Court tentatively finds that the proposed
4 award of fees, costs, and compensation is fair, reasonable, and adequate. However,
5 the Court cannot complete its analysis before final approval of the Settlement
6 Agreement is granted.

7

8 III. Reimbursement Costs

9

10 Class counsel requests an award of \$27 million in litigation costs, a discount
11 from the \$30,606,117 in total costs incurred thus far.¹⁷ (Motion at 26.)

12

13 A. Legal Standard

14

15 An attorney who has created a common fund for the benefit of the class is
16 entitled to reimbursement of reasonable litigation costs from that fund. See, e.g.,
17 In re Omnivision Techs., 559 F. Supp. 2d at 1048 (citing Harris v. Marhoefer, 24
18 F.3d 16, 19 (9th Cir. 1994)). The award “should be limited to typical out-of-
19 pocket expenses that are charged to a fee paying client and should be reasonable
20 and necessary.” In re Immune Response Sec. Litig., 497 F. Supp. 2d 1166, 1177
21 (S.D. Cal. 2007) (citing In re Media Vision Tech. Sec. Litig., 913 F. Supp. 1362,

22

23 ¹⁷ Litigation costs are detailed in (1) the Declaration of Steve Berman
24 ¶¶ 129-35, and accompanying exhibits; (2) the Declaration of Marc Seltzer
25 (Docket No. 3563-7) ¶¶ 34-36, and accompanying exhibits; (3) the Declarations of
Plaintiffs’ Counsel accompanying Appendix A (Docket Nos. 3563-1 to 3563-7),
and accompanying exhibits (collectively, the “Expense Reports”).

1 1366 (N.D. Cal. 1996)). “The taxation of costs lies within the trial court’s
2 discretion.” In re Media Vision Tech., 913 F. Supp. at 1366 (citation omitted).

3

4 B. Discussion

5

6 Specifically, class counsel seek reimbursement for Shared and Held Costs as
7 defined by the Court’s Fee Order (Docket No. 483). These include costs for, *inter*
8 *alia*, (1) fees paid to or incurred by experts; (2) computerized research and other
9 services; (3) court filing and service costs; (4) deposition and court reporter costs;
10 (5) costs associated with the document depository; (5) printing, copying, and
11 shipping costs; and (6) travel costs. (See generally Expense Reports). Pursuant to
12 the Settlement Agreement, Toyota does not object to this request. (Settlement
13 Agreement § VII.) The Court has received no specific objections to billed line-
14 items, although one objector requests that a Special Master review the costs.¹⁸
15 (E.g., Objection No. 9.)

16

17 The Court has reviewed the Expense Reports, whose detail belies any need
18 for the appointment of a Special Master. The Court finds that the requested costs
19 were reasonable and necessary. Courts may direct reimbursement for travel costs.
20 In re Immune Response, 497 F. Supp. 2d at 1177 (citation omitted). Postage,
21 telephone, fax, and notice costs, and filing fees and photocopies, also are necessary

22

23 ¹⁸ The Court finds that the class also was aware of the costs provision in the
24 Settlement Agreement. The notice stated that class counsel will request “up to an
25 additional \$27 million in costs and expenses,” that Toyota will separately make
any such payment, and that any such payment “will not reduce the value of the
settlement benefits made available to Class Members.” (Short Form Notice ¶ 14.)

1 costs in complex class action litigation and are recoverable. Id. “[C]omputerized
2 legal research ‘is an essential tool of a modern efficient law office,’” and the
3 complexity of this case justifies the costs of these services as well. Id. (quoting
4 Robinson v. Ariyoshi, 703 F. Supp. 1412, 1436 (D. Haw. 1989)). Mediation costs
5 and contributions to the litigation fund (assessment fees) also are reimbursable.
6 See id. (citing Lenahan v. Sears, Roebuck & Co., Civ. No. 02-0045, 2006 WL
7 2085282, at *22 (D.N.J. July 24, 2006) (approving mediation fees reimbursement
8 in common fund case); In re Media Vision Tech., 913 F. Supp. at 1372 (approving
9 assessment fee reimbursement)). In addition, given the complex factual nature of
10 this case and the extensive disputes over liability, the “expert testimony submitted
11 was ‘crucial or indispensable’ to the litigation at hand” and the ultimate settlement
12 between the parties and therefore should be reimbursed. Id. at 1366 (quoting
13 United States v. City of Twin Falls, 806 F.2d 862, 864 (9th Cir. 1986)).

14

15 C. Conclusion as to Reimbursement Costs

16

17 For the foregoing reasons, the Court tentatively finds that the proposed
18 award of costs is fair, reasonable, and adequate. However, the Court cannot
19 complete its analysis before final approval of the Settlement Agreement is granted.

20
21
22
23
24
25

1 IV. Compensation to Named Plaintiffs and Class Representatives

2

3 Plaintiffs and class counsel request that the Court approve the proposed
4 incentive awards to named plaintiffs and class representatives, as provided for in
5 § VII(E) of the Settlement Agreement and detailed in Appendix B (Docket No.
6 3563-8.) Plaintiffs believe the awards are justified because of the work provided
7 by these individuals, the burdens borne by them during the litigation, and their
8 efforts on behalf of the class and the general public. (Motion at 26-27.) Pursuant
9 to the Settlement Agreement, each individual is to be compensated at a rate of \$100
10 per hour of work, with a minimum award of \$2,000. There are 87 separate
11 proposed awards, totaling \$395,270.¹⁹ (See Appendix B.) Most compensation
12 awards are for less than \$5,000; only six are for \$10,000 or more. (Id.)

13

14 Toyota does not object to this request. The Court has received no objections
15 to any particular incentive award. The objections more generally are: (1) the notice
16 did not properly disclose the specific amount of each award; (2) the amount of the
17 awards creates a conflict of interest between named plaintiffs and class
18 representatives vis-à-vis the class; and (3) awards are excessive. (E.g., Objection
19 No. 46.) As explained below, the Court finds that these objections lack merit and
20 approves the requested awards.

21

22

23 ¹⁹ Each named plaintiff and class representative has submitted a declaration
24 substantiating his or her involvement. (See Declarations of Class Representatives
25 & Named Plaintiffs (“Incentive Award Declarations”), Docket Nos. 3563-9 to
3563-14.)

1 A. Legal Standard

2

3 Incentive awards are “intended to compensate class representatives for work
4 done on behalf of the class, to make up for financial or reputational risk undertaken
5 in bringing the action, and, sometimes, to recognize their willingness to act as a
6 private attorney general.” Rodriguez v. W. Publ’g Corp., 563 F.3d 948, 958-59
7 (9th Cir. 2009). Such payments must be “scrutinize[d] carefully . . . so that they do
8 not undermine the adequacy of the class representatives.” Radcliffe v. Experian
9 Info. Solutions, Inc., — F.3d —, 2013 WL 1831760, at *3 (9th Cir. 2013) (citing
10 Staton, 327 F.3d at 977); Rodriguez, 563 F.3d at 959 (“An absence of material
11 conflicts of interest between the named plaintiffs and their counsel with other class
12 members is central to adequacy and, in turn, to due process for absent members of
13 the class.” (citing Hanlon, 150 F.3d at 1020)). In evaluating an incentive award,
14 the court should consider “the actions the plaintiff has taken to protect the interests
15 of the class, the degree to which the class has benefitted from those actions, . . . the
16 amount of time and effort the plaintiff expended in pursuing the litigation . . . and
17 reasonabl[e] fear[s of] workplace retaliation.” Staton, 327 F.3d at 977 (quoting
18 Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)).

19

20 B. Discussion

21

22 First, the notice clearly explained that “Class Counsel will ask for payments
23 to each of the Plaintiffs and Class Representatives of \$100 per hour, with a
24 minimum of \$2,000 award, for their time invested in connection with the Actions.”
25 (Short Form Notice ¶ 14.) The Incentive Award Declarations were filed on April

1 23, 2013 (before the objection deadline), and detailed the specific amount
2 requested. Thus, the class was not prejudiced by the lack of specific information in
3 the notice.

4

5 Second, there is no evidence or reason to infer that the awards – none of
6 which are excessive – created any conflict of interest between named plaintiffs and
7 class representatives vis-à-vis the class. In Staton, a settlement would have
8 awarded 29 class representatives up to \$50,000 each, with an average award of
9 \$30,000 and a total award of \$890,000. 327 F.3d at 976-77. The award was not
10 limited to the amount of hours a class representative worked on the matter. See id.
11 The Ninth Circuit concluded that the payments undermined the adequacy of the
12 settlement. Id. at 977-78. There was insufficient evidence that the class
13 representatives had the strongest claims and were not just people who retained
14 counsel before settlement, and many receiving incentive awards were not essential
15 to the litigation. Id. at 977. These issues and the fact that the awards were much
16 larger than the payments to individual class members “eliminate[d] a critical check
17 on the fairness of the settlement for the class as a whole” and created a danger that
18 the representatives were “more concerned with maximizing those incentives than
19 with judging the adequacy of the settlement as it applies to class members at
20 large.” Id.

21

22 In Rodriguez, 563 F.3d at 957, retainer agreements required class counsel to
23 request incentive awards that increased on a sliding scale as the class’s monetary
24 recovery increased. The court found that the agreements gave the named plaintiffs
25 no incentive to settle for less than the maximum contemplated relief, and no

1 incentive to go to trial even if trial was best for the class. Id. at 959.

2
3 Most recently, in Radcliffe, the Ninth Circuit reversed a final approval
4 where the settlement explicitly conditioned the incentive awards on the
5 representatives' support for the settlement and the payments were in a fixed
6 amount (\$5000) that significantly exceeded what absent class members could
7 expect to recover (from \$26 to \$750). 2013 WL 1831760, at *5. These
8 shortcomings "fatally alter[ed] the calculus for the class representatives, pushing
9 them to be 'more concerned with maximizing [their own gain] than with judging
10 the adequacy of the settlement as it applies to class members at large.'" Id.
11 (quoting Staton, 327 F.3d at 977).

12
13 The Court has reviewed each Incentive Award Declaration and finds that the
14 specific concerns in Staton, Rodriguez, and Radcliffe are not present here. No one
15 disputes that the individuals effectively and honestly fulfilled their obligations and
16 contributed to the Settlement Agreement. This litigation involved extensive risks,
17 and each individual spent a significant amount of time reviewing the complaint,
18 conferring with counsel, reviewing communications, responding to document
19 requests and interrogatories, attending depositions, and discussing the proposed
20 settlement, among other things. (See generally Incentive Payment Declarations.)
21 Those seeking greater awards substantiate their greater involvement, such as
22 attending depositions or having their vehicles inspected. (E.g., Incentive Award
23 Declaration of Dale Baldisseri, Appendix B, Ex. 2.) The largest awards are sought
24 by an automotive sales dealership, a rental car business, and a residual value
25 insurer and lease maturity vehicle liquidator. (See Incentive Award Declaration of

1 Green Spot Motors Co., Appendix B, Ex. 18 (assisted experts to evaluate claims
2 and damages); Incentive Award Declaration of Deluxe Holdings, Inc., Appendix B,
3 Ex. 19 (made fleets available for inspection and assisted experts); Incentive Award
4 Declaration of Auto Lenders Liquidation Center, Inc., Appendix B, Ex. 20
5 (investigated unintended acceleration in company's subject vehicles).) It should
6 not be surprising that efforts of these commercial entities were more extensive than
7 those of consumers.

8

9 Furthermore, there is no evidence that named plaintiffs and class
10 representatives entered into pre-settlement retainer agreements with their counsel
11 such that their actions and decisions on behalf of the class were skewed in favor of
12 settlement rather than continued litigation. There is no evidence that the incentive
13 awards are conditioned on support for the Settlement or that any individual was
14 threatened with no award if she opposed the Settlement. (See Berman Decl.
15 ¶ 136.) Even though named plaintiffs and class representatives will receive
16 monetary awards greater than other members of the class, that is not in itself
17 unreasonable, and the total value of the award here – \$395,270 – is minuscule
18 compared to the overall value of the Settlement. In addition, the amount of any
19 award over \$2,000 is conditioned expressly on the time each individual has
20 expended. There is no other differential treatment. Thus, there are no skewed
21 incentives like in Staton, where 29 people were to receive \$890,000 in incentive
22 awards.

23

24 The requested incentive awards also are typical if not lower than those in
25 comparable litigation. See, e.g., In re U.S. Bancorp Litig., 291 F.3d 1035, 1038

1 (8th Cir. 2002) (approving \$2,000 incentive awards to five named plaintiffs out of
2 a class potentially numbering more than 4 million in a settlement of \$3 million); In
3 re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litig., 280 F.R.D.
4 364, 383 (N.D. Ill. 2011) (awarding \$25,000 in the aggregate for five class
5 representatives and noting that “an empirical study of incentive awards to class
6 action plaintiffs has determined that the average aggregate incentive award within a
7 consumer class action case is \$29,055.20, and that the average individual award is
8 \$6,358.80”); In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine)
9 Prods. Liab. Litig., 553 F. Supp. 2d 442, 489-90 (E.D. Pa. 2008) (granting over
10 thirty named plaintiffs \$10,000 each in incentive award following \$6.4 billion
11 settlement agreement); Ingram v. Coca-Cola Co., 200 F.R.D. 685, 694 (N.D. Ga.
12 2001) (approving service awards of \$300,000 to named plaintiffs for the services
13 provided to the class by responding to discovery, participating in the mediation
14 process, and taking the risk of stepping forward on behalf of the class, where each
15 class member’s recovery would average approximately \$38,000). The Court
16 therefore finds that the use of a per-hour approach to the award has not created
17 excessive awards for any individual.

18
19 In short, nothing indicates that the proposed incentive payments “removed a
20 critical check on the fairness of the class-action settlement, which rests on the
21 unbiased judgment of class representatives similarly situated to absent class
22 members.” Radcliffe, 2012 WL 1831760, at *5. The Court finds no structural
23 deficiencies in the global compromise as a result of these payments. See Amchem
24 Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) (“The settling parties, in sum,
25 achieved a global compromise with no structural assurance of fair and adequate

1 representation.”)

2

3 C. Conclusion as to Compensation to Named Plaintiffs and Class
4 Representatives

5

6 For the foregoing reasons, the Court tentatively finds that the proposed
7 award of compensation is fair, reasonable, and adequate. However, the Court
8 cannot complete its analysis before final approval of the Settlement Agreement is
9 granted.

10

11 V. Conclusion

12

13 For the foregoing reasons, the Court tentatively finds that the proposed
14 award of fees, costs, and compensation is fair, reasonable, and adequate. The
15 Court will complete its analysis upon granting final approval of the Settlement
16 Agreement. Accordingly, the Court holds in abeyance the Motion for an Award of
17 Attorneys’ Fees, Reimbursement of Expenses, and Compensation to Named
18 Plaintiffs.

19

20 **IT IS SO ORDERED.**

21

22 DATED: June 17, 2013

23

24

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JAMES V. SELNA
UNITED STATES DISTRICT JUDGE